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## I. CHRONOLOGICAL LIST OF IMPORTANT DOCKET ENTRIES

1966

- May 24. Information filed in Oakland County Circuit Court.
- Oct. 6. Motion to quash information is denied.
- Oct. 18. Jury impaneled and sworn; proofs heard in part.
- Oct. 19. Proofs continued and heard in part.
- Oct. 20. Proofs continued and heard in part.
- Oct. 21. Verdict of guilty of rape returned by jury.
- Nov. 9. Defendant sentenced to from 20 to 40 years in State Prison For Southern Michigan.

1969

- Oct. 1. Defendant's conviction affirmed by the Michigan Court of Appeals.

1971

- Aug. 27. Defendant's conviction affirmed by the Supreme Court of the State of Michigan.

1972

- Dec. 22. Defendant's Petition For A Writ of *Habeas Corpus* granted by the United States District Court, Eastern District of Michigan.

1973

- June 21. United States District Court's grant of writ of *habeas corpus* to defendant is affirmed by the United States Court of Appeals, Sixth Circuit.



- Sept. 14. Petition for a writ of *certiorari* is filed by plaintiff in the United States Supreme Court.
- Dec. 3. United States Supreme Court grants plaintiff's petition for a writ of *certiorari* to the United States Court of Appeals, Sixth Circuit.

## II. REFERENCE TO OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit was filed on June 21, 1973. The decision of the United States District Court, Eastern District of Michigan, Southern Division, was filed on December 22, 1972 and is reported at 352 F Supp 266 (E. D. Mich, 1972). The opinion of the Supreme Court of the State of Michigan was filed on August 27, 1971, and is reported at 385 Mich 594; 189 NW2d 290 (1971). The opinion of the Michigan Court of Appeals was filed on October 1, 1969, and is reported at 19 Mich App 320, 172 NW2d 712 (1969). Copies of each of the opinions cited above were included in the Appendix to the printed Petition For A Writ of Certiorari. Therefore, in accordance with the procedure of this Court, those opinions are not included in this Appendix. The opinions of the lower courts may be found at pages 13-39 of the Appendix to the Petition For A Writ of Certiorari.

III. TRANSCRIPT OF THE PRELIMINARY EXAMINATION, MAY 13, 1966, PAGES 93-100

(93) Mr. Dinan: People call Detective Anderson to the stand please.

ALPHONSE ANDERSON, a witness for and in behalf of the People of the State of Michigan, having first been duly sworn by the Honorable R. Grant Graham, Justice of the Peace for the Township of Pontiac, testified as follows:

*Direct Examination*

By Mr. Dinan:

Q. Give the Court your name and occupation please?

A. Alphonse Anderson, Detective with the Oakland County Sheriff's Department.

Q. How long have you been a detective, Mr. Anderson?

A. Approximately nine years.

Q. Now, I'm going to direct your attention to the date of April 19, 1966, and ask you if any time during the course of that day you investigated an alleged criminal assault?

A. Yes, I did.

Q. What did—what did you do by way of investigation of the matter, if anything?

A. The night, April 19th approximately at 9:00 o'clock I received a call at home that a subject by the name of Thomas Wayne Tucker had been picked up.

Q. I see. What did you do, if anything?

A. Immediately left home for Pontiac.

Q. Did you see Mr. Tucker as you arrived at the Sheriff's Office?

A. Yes, I did.

Q. I see. And did you apprise Mr. Tucker of what he was being detained for?

(94) A. Yes, I did. He seemed to understand that he—what he was arrested for.

Q. Regardless of whether he understood or not, did you inform him of what he was arrested for?

A. Yes, I did.

Q. Now, did you interrogate Mr. Tucker at all?

A. Not at that time, but we later did.

Q. I see. Did you at the time you first saw Mr. Tucker, did you inform him after he was advised of what he was arrested for, did you inform him of any Constitutional rights he might have?

A. Yes, I did.

Q. And in particular, what did you tell him relative to these Constitutional rights?

A. He was sitting in the office directly across from the booking office, that's our main office at the Oakland County Jail.

Q. Yes.

A. And I went into the office there, was approximately, I'd say about 9:30 and talked to him a short time and he knew me and I knew him so we had a conversation and I informed him that he was—what he was locked up for—and advised him that if he had wanted an attorney he could have an attorney or he could—didn't have to say—in other words, his Constitutional rights.

Q. You told him he had a right to have an attorney with him there, correct?

(95) A. Right. He said at that time he said he didn't know whether he needed an attorney.

Q. Um-hum. Did you tell him he had a right—

Mr. Moore: Object to this your Honor. The officer can testify what he told him as far as his Constitutional rights are concerned and not have leading questions.

The Court: Objection sustained.

Q. (By Mr. Dinan): I'll reiterate my question, Detective. In particular, what, if any, Constitutional rights other than what you have testified to, he had a right to counsel, what else did you tell him ~~relative to his rights~~ at that time?

A. That he didn't have to say anything and—

Q. Anything else?

A. Also I just don't recall right at that time exactly the words I did use.

Q. Any mention made of using evidence against him if he did make any statement?

A. Well, he emphasized he understood all this.

Q. Did you tell it to him? I don't want to know if he understood, I want to know if you told it to him.

A. Yes, I believe I did.

Q. Was anyone else present in the—

A. No one else present.

Q. —in the room. I see. And you say you have been a detective nine years, is that correct?

(96) A. Yes, I have.

Q. And in the course of this activity as a detective, have you interrogated many suspects of crimes, is that correct?

A. Yes, I have.

Q. And in view of your procedures and interrogations, are you aware of the rights that a defendant has upon arrest?

A. Yes, I do.

Q. And do you make it a practice to admonish, as it were, or explain to the defendants his Constitutional rights as a matter of routine procedure?

Mr. Moore: Not material. Objection, your Honor. The only thing material in the question of Constitutional rights is what he did in this case.

Mr. Dinan: If your Honor please, I'm establishing this witness is a police officer who, as one of his basic functions is interrogation, that he performs the duties as a routine, and by so establishing, I would want to prove for the Court's determination this was exactly what happened in the case.

The Court: I'll let him answer what his procedure is routinely.

Q. (By Mr. Dinan): Would you answer the question, please?

A. Well, as I say, we always do, after an arrest, before we start to interrogate, always advise them of their Constitutional (97) rights, that they didn't have to make any kind of statement that they could have an attorney if they wished one and also advised that if he did make a statement it could be used at a later date in court.

Mr. Dinan: All right, fine. No further questions.

### *Cross Examination*

By Mr. Moore:

Q. Now, Officer, what is customary of your procedure, don't tell us. Let's get down to the 19th of April, 1966. You and Mr. Tucker are in the room across the hall from the interrogation room at the Oakland County Sheriff's Department or from the booking room, excuse me. Do you remember that specific occasion, the exact language you used when you advised Mr. Tucker of his Constitutional rights?

A. Well, at the time I believe I asked him if he knew what he was arrested for, he stated yes and then I proceeded to ask him whether he wanted an attorney or not, also if he understood his Constitutional rights and—

Q. Now, am I correct, Officer, you had seen Mr. Tucker before?

A. Yes, I had a number of times.

Q. This would be in your duties as a police officer?

A. (Nods head yes.)

Q. Am I correct you, as a police officer, having seen Mr. Tucker before, might very well assume he might know what his Constitutional rights were, probably had been apprised of them before?

A. He has been advised of them at other times.

(98) Q. You assumed he knew what his rights were, correct, because you had dealing with him before, isn't that right?

A. Well, we discussed that point that he knew that he understood it, he understood his rights but I also advised him of his rights at the time.

Q. I think you stated that you asked him if he knew of his Constitutional rights, is that right?

A. Yes, I did.

Q. What was his answer?

A. He said yes.

Q. All right. Now, did you have any other conversation other than asking him if he knew what he was arrested for and if he knew what his Constitutional rights were, did you have any other conversation with him concerning what his Constitutional rights were?

Mr. Dinan: I want to object, your Honor. Counsel has asked the question already and it's been answered by the witness. He explained to the man even though he knew the man was familiar with police procedure. He even testified on cross-examination and on direct in spite of this

he still went to the explicit pains to inform him of exactly what his Constitutional rights were and I think Counsel is being very repetitious in asking the question over. (99) I would ask the Court to censure—

The Court: I believe he answered the question. Let's have the court reporter—the question was: "What was the exact language you used this specific occasion to advise Mr. Tucker of his Constitutional rights when he was in—you originally used the interrogation room across from the booking room inside the Oakland County Sheriff's Department?" If she can find the question I'd like to have the answer read back.

(Record read.)

Q. (By Mr. Moore): Am I correct, Officer, then, that you asked him if he knew what he was arrested for and he said yes and you asked did he want an attorney and he said no, and you asked did he know his Constitutional rights and he said yes?

A. He said yes.

Q. Do you recall those specific questions and those answers?

A. Yes.

Q. All right. Did you have any other conversation with him concerning his Constitutional rights other than these three questions?

A. Yes.

Q. All right, what was that?

A. Also explained to him whatever he said, any statements he made, (100) could be used against him further, at a further date in court.

Q. Do you specifically remember telling Mr. Tucker that this particular occasion in that particular room?

A. Yes, I do.

Q. That anything he said could be used against him in court?

A. That's right.

Q. That what you told him?

A. (Nods head yes.)

Q. Anything else?

A. I don't recall off-hand.

Q. You don't recall anything else, is that correct?

A. No, I don't.

Mr. Moore: I have nothing further, your Honor.

The Court: Any further questions?

Mr. Dinan: No further questions, your Honor.

The Court: Step down.

Mr. Dinan: Step down. People at this time would rest, your Honor and move to bind.

The Court: Counsel, you have any statement?

Mr. Moore: I'm presuming you're not moving to admit that picture?

Mr. Dinan: No, I won't.

Mr. Moore: In response, your Honor, we would request that the Prosecution's motion be denied. The only evidence we have before the Court first of all that • • •



IV. TRANSCRIPT OF PRE-TRIAL MOTIONS,  
OCTOBER 6, 1966, PAGES 35-41.

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The Court: I was going to suggest he probably ought to. But you have another motion to suppress evidence, do you not? I see one in the file. Unless it's been ruled on by another judge.

Mr. Vanderkloot: Your Honor, I have—

The Court: Concerning a Robert Henderson.

Mr. Vanderkloot: Yes, your Honor, they're similarly titled. I was not very inventive as to titles, it seems. That relates to the testimony of Robert Henderson.

The Court: Yes, proceed to that one, please.

Mr. Vanderkloot: Well, your Honor, I reviewed the language in the Wong Sun against the United States, I refer the Court's attention, and I see the Court has not only kindly looked at it, but placed it in a place of honor before the Bar.

The Court: Did you want it to refer to now?

Mr. Vanderkloot: I don't need to, your Honor, I know the Court has looked at it, and the proposition I'm advancing here is once we establish that a statement taken, (36) statement attempted to be taken is taken contrary to the requirements of the constitution of the United States and of the State of Michigan, the information obtained thereby is inadmissible.

The Court: Do you need this case to refer to?

Mr. Vanderkloot: I do not, your Honor. The case that I do refer to is the case of People vs. Fordyce, that's—it's September 15, 1966, volume 378, No. 3. People against Fordyce, your Honor, adopts the opinion of the United States Supreme Court in Miranda versus Arizona, 384 U.S.—

The Court: That's the one that set the date?

Mr. Vanderkloot: Yes, and it also adopts the case of Johnson versus New Jersey, 384 U.S. 719. Reading from page 211 of 378 Michigan, the Court says:

"On June 20, 1966, the Supreme Court of the United States, in the case of Johnson vs. New Jersey—" I'll omit the citation—"held that the guidelines set forth in Miranda are available only to persons whose trials had not begun as of June 13, 1966."

That means that what Miranda says applies to any trial held after June 13, 1966. What Miranda says, is as follows:

"When an individual is taken into custody or otherwise (37) deprived of his freedom by the authorities and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege, and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney, one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warn-

ings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him."

(38) Now, it's clear in this case that two of the things required here were not done, with due respect to Detective Anderson, I have my doubts as to the effectiveness of the other. Not because there's anything wrong with this man, he's a good friend of mine, but he has so darn many cases to do all the time, I think it's difficult for any man to remember everything to do all the time. And as defense counsel, I spend many hours giving free lectures to policemen on procedural matters to follow in the law of arrests. That's my little contribution to this problem. But on this side of the fence, I'm sitting now, the law has been laid out. And the thing I think is good about it, there isn't any question what you're supposed to do from now on.

The Court: No question, Miranda had something to do concerning a statement of an individual who is going to testify.

Mr. Vanderkloot: I can't argue about that, your Honor, it does say "no evidence."

The Court: It's dicta, is it not, at the very most?

Mr. Vanderkloot: I can't quarrel with that, you Honor.

The Court: I understand your problem. The problem is that you claim through information gotten from the (39) defendant, they then approached this man, Henderson. Henderson will be a witness who will testify, is that correct?

Mr. Vanderkloot: That's right, your Honor.

The Court: Because they got the information from the defendant, therefore he cannot testify, under the Miranda case?

Mr. Vanderkloot: That's correct, your Honor. I do want to see Wong Sun once again, see what the statement is that we're talking about. Here is a statements, and I guess you would call an esculatory statement, the respondent says, "Well, I can explain—"

The Court: Now, to your knowledge, is there any plan to use what—the statement of this defendant in this trial, the one you're referring to?

Mr. Vanderkloot: This, I don't know.

The Court: Is there, Mr. Roberts, any intention to use the statement of the defendant which led to Henderson in this trial, or are you going to use Henderson?

Mr. Roberts: Let me put it this way, if the Court please, rather than giving a direct answer, we would be happy to abide by the Court's decision.

The Court: It seems to me -why would (40) you need it in the first place?

Mr. Roberts: I beg your pardon?

The Court: Why would you need his paragraph two "It's believed the identity of Robert Henderson was learned through interrogation of the defendant."

Mr. Roberts: Uh-huh.

The Court: Do you intend to use that, the statement of the defendant, to the officers, which lead to the identity of Henderson?

Mr. Roberts: To be very frank, I think we had, yes. But on the other hand, we need not.

The Court: It seems to me that may very well be inadmissible. But it would be my opinion that the—I'm familiar with the Miranda case, I've read it many, many times. And I do not feel that the Miranda case would apply to the testimony of Henderson himself.

Mr. Roberts: Very well.

The Court: That would be my ruling.

Mr. Vanderkloot: I just wanted to—

The Court: I'm sorry—I've read Wong Sun.

Mr. Vanderkloot: "The government also contends that Toy's declarations should be admissible because they (41) were ostensibly exculpatory, rather than incriminating."

The Court: That's Toy's declaration.

Mr. Vanderkloot: But they led to the evidence which implicated Toy.

The Court: That was physical evidence, not evidence which would be produced under oath in court.

Mr. Vanderkloot: That's correct.

The Court: It would be my ruling that your motion to suppress for the reasons which I've already stated, is not well founded, and the motion to suppress the evidence concerning the testimony of Robert Henderson is denied.

That leaves one motion and that's the first one that you started arguing and that's the motion to suppress the evidence found on the defendant. And, Mr. Roberts, I believe, intends to put the officer on the stand. Is that correct?

Mr. Roberts: Yes, your Honor.

The Court: Is he here?

Mr. Vanderkloot: There were two grounds, one was the arrest, the other was the long confinement before arraignment.

The Court: All right.

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V. TRANSCRIPT OF TRIAL, OCTOBER 18, 19, 20, 21,  
1966, PAGES 216-236

(216) A. I knew at that time it was the man I was looking for.

Q. Why did you know that?

A. On account of the report I received when I called the Oakland County Sheriff's Department.

Q. So when you got the ID card, you knew it was the man you were looking for?

A. Yes, sir.

Q. Not until then?

A. No, sir.

Mr. Vanderkloot: No further questions.

ROBERT HENDERSON, a witness for and in behalf of the people of the State of Michigan, being first duly sworn, testified as follows:

*Direct Examination*

Conducted by Mr. Roberts:

Q. Your full name, witness?

A. Robert T. Henderson.

(217) Q. Where do you live, Mr. Henderson?

A. 590 Upland, Pontiac,

Q. Upland?

A. Right.

Q. That is in the City of Pontiac?

A. Yes, sir.

Q. Are you employed?

A. Yes. I am laid off right now.

Q. Where were you employed?

A. Fredman's Construction.

Q. You have been laid off since when?

A. October 6. Whenever the carpenters went on strike there.

Q. This year?

A. Yes.

Q. Are you a carpenter by trade?

A. No.

Q. Helper?

A. Laborer.

Q. Mr. Henderson, directing your attention to the 19th day of April of this year, did you see the Defendant, Mr. Tucker?

A. Yes.

Q. Where, sir?

A. At the house where I was staying.

(218) Q. Approximately what time?

A. Around one o'clock.

Q. One o'clock, morning or afternoon?

A. Afternoon.

Q. Then it was daylight?

A. Right.

Q. And who was there with you at the time?

A. Jean Madsen and two of her kids.

Q. Their names and ages?

A. Rickie Madsen is five and Dawn Madsen, three.

Q. What were you doing at the time that Mr. Tucker arrived?

A. Cleaning a goose.

Q. Are you a hunter?

A. Yes.

Q. Had this been the result of your endeavors or someone gave it to you?

A. No, I shot it.

Q. And did you make any observations of Mr. Tucker at the time of his arrival?

A. No, I didn't. The little boy Rickie did.

Q. Where was Rickie at the time?

A. He was standing there watching.

Q. Standing near you?

(219) A. Yes.

Q. Watching you?

A. Clean the goose.

Q. And where was Rickie—strike that. Rickie was nearest to you?

A. No. He was standing right there.

Q. How far from you was Mr. Tucker?

A. Just across from some newspaper I had laid on the floor.

Q. And you were talking—we are talking about at the most what distance?

A. Three feet.

Q. And what, if anything, did Rickie say?

A. He asked what happened to Wayne's face there.

Mr. Vanderkloot: Objection to what he said. It's hearsay.

The Court: The objection is sound.

Mr. Roberts: May I indicate to the Court that the witness has testified that he was cleaning the goose, that Rickie was standing right next to him, that there were three feet separating Rickie from the Defendant.

A. No, there was three feet between me and—

The Court: The objection is what Rickie may have said is hearsay.

Mr. Robert: I am asking the Court (220) for a ruling when it is stated in the presence of the Defendant.

The Court: I think I will excuse the Jury for a moment. The Jury may be excused to the Jury Room.



(At this time the Jury left the courtroom.)

In the absence of the Jury

The Court: Let the record indicate the Jury is now absent. What exception do you claim to the hearsay rule?

Mr. Roberts: I am claiming, if the Court please, that remarks made by a third party, said in the presence of the Defendant is an exception to the hearsay rule.

Mr. Vanderkloot: I haven't seen indications that it was directed to him. Therefore, I respectfully maintain my objection.

The Court: You may proceed on a Separate Record.

### *Separate Record*

(221) Examination Conducted by Mr. Roberts:

Q. You say at the most three feet separated you from the Defendant?

Mr. Vanderkloot: Objection. It's leading.

The Court: We are on a Separate Record.

Q. I asked you what was the furthest distance that separated you from Mr. Tucker. You said "three feet".

A. Yes sir.

Q. What was the maximum of distance between you and, between you and Rickie at the time three feet separated you from Mr. Tucker? What was the maximum distance that existed between you and Rickie?

A. Tucker was across from me and Rickie would be here.

Q. How far would Rickie be from you at the most?

A. Foot and a half.

Q. And how far was Rickie from Mr. Tucker?

A. Foot and a half.

Q. So you were all right there within a small area, and the maximum distance that separated you from Mr. Tucker

is three feet. The maximum distance that separated you from Rickie is the same which separated Rickie from the Defendant, which (222) is a foot and a half?

A. Right.

Mr. Roberts: If the Court please, I am submitting to the Court that remarks made by any one of the three, especially by Rickie, it's a declaration of a third party, but it's an exception to the hearsay rule, having been made in the presence of the Defendant.

The Court: I agree with you, but when you seek to use "Rickie" then you approach the line.

Mr. Vanderkloot: I maintain my position.

The Court: If you insist on asking the question, I think there should be research before it is asked in the presence of the Jury.

Mr. Roberts: Very well.

The Court: The Court will be in recess.

### *Recess*

In the presence of the Jury

The Court: I believe you asked a (223) question.

Mr. Roberts: Yes, your Honor. I will withdraw the question.

Examination continued by Mr. Roberts:

Q. Mr. Henderson, you say that you and the Defendant and Rickie were together while you were cleaning the goose, is that correct?

A. Right.

Q. And at this point, at this time, did you have any conversation with the Defendant or he with you?

A. Yes, while we was cleaning, while we was cleaning the goose.

Q. Will you tell us what you said, if anything, and what he said while you were cleaning the goose?

A. I asked him about his face there, asked him if he got hold of a wild one or something.

Q. Was there any response to this inquiry by you in behalf of Mr. Tucker?

A. He said "something like that".

Q. Was there anything further stated by you at this time?

A. No, not at the moment.

Q. Anything further stated by Mr. Tucker at this time?

(224) A. No.

Q. Then what did you do? What did you do after this conversation had passed?

A. I waited a little bit there.

Q. Just one moment. You are going to have to talk up so these last two people here can hear you, this young lady and this gentlemen here.

A. I waited for a few minutes and I asked him something else.

Q. What did you ask him?

A. I asked him who it was.

Q. Did you get a response to that?

A. Yes.

Q. What did he say, please?

A. He said some woman lived the next block over, and he said, "She is a widow woman," or something like that.

Q. Anything further stated at this time?

A. No.

Q. Any description of the woman given?

A. No, he just said about in her thirties or something.

Mr. Vanderkloot: Object. The question is leading.

The Court: I don't think that question is leading. You may have an answer.

(225) A. He said she was in her thirties or something like that.

Q. And how long did it take you to clean the goose?

A. Not too long. Well, I tried picking it, but I couldn't, so I skinned it out.

Q. Beg pardon?

A. I tried picking it, but it was too hard, so I skinned it out.

Q. What do you mean by "skinned it off"?

A. Instead of plucking it, I just took the skin off.

Q. How long did this take, if you know?

A. Twenty minutes.

Q. How long was it after Mr. Tucker arrived that he left your place?

A. Eight o'clock that night.

Q. How did he get to your home?

A. Drove his car.

Q. What kind of car did he drive?

A. '59 Ford.

Q. Color?

A. Red.

Mr. Roberts: You may Cross Examine, Counsel.

(226). *Cross Examination*

Conducted by Mr. Vanderkloot:

Q. Mr. Henderson, have you ever been arrested and convicted of a crime?

A. Yes.

Q. And when was that?

A. '57.

Q. Any other occasion?

A. '60.

Q. Went to Ionia?

A. Right.

Q. So you have had occasion to know Detective Anderson?

A. I don't remember if I met him down there or not at the Station.

Q. Did you have to talk to some of these Officers?

A. Pardon me?

Q. Did you talk to some Officers in the Sheriff's Department?

Mr. Roberts: When, if the Court please. He has asked if he was arrested. He said '57 and '60, and now he wants to talk with the Officers.

The Court: In relation to what matter?

(227) Mr. Vanderkloot: In relation to this matter, the matter before the Court right now.

The Court: You may answer.

Q. Did you have occasion to talk to the Officers of the Sheriff's Department?

A. In what way that you mean?

Q. About this particular matter?

A. Sure, when they come out to the house there to subpoena me and that.

Q. How about before they subpoenaed you?

A. Yes, I had to go down to the Police Station.

Q. And who did you talk with there?

A. Fredericks and Anderson.

Q. Did you see Detective Anderson here today?

A. Yes.

Q. Where is he?

A. There.

Q. Indicating Detective Anderson. Do I understand from looking at the preliminary examination, page eighty-five, Counsel, that you saw the Defendant that evening, the evening previous to the incident you described on Direct Examination?

A. Yes.

Q. Do you remember you were asked this question: "It was about (228) ten o'clock when you left? Answer—Between ten and ten thirty, somewhere in there." Do you recall that answer, that question and answer?

A. Yes.

Q. Were you asked this question: "I see. Can you describe, if you can, what Mr. Tucker was wearing on that occasion? Answer—He had tan pants on, I think. Question—Um-hum. Answer—I am not positive of it though." Do you recall having that set of questions and answers?

A. Right.

Q. "Question—Anything else remarkable about his dress? Answer—He had a light shirt on or a pink shirt, I forget." Do you remember giving that answer to that question?

A. Right.

Mr. Roberts: If the Court please, can we have a clarification as to what date this testimony referred to? It's in the transcript.

The Court: The Jury is entitled to know.

Mr. Vanderkloot: Yes.

Q. This would be the evening of the 18th?

A. Right.

Mr. Vanderkloot: That's all.

(229) Q. The time you saw Mr. Tucker, in the conversation while you were cleaning the goose, that was the next day?

A. Yes.

Q. What time of day was it, did you say?

A. One o'clock.

Q. The last you saw him was between ten and ten-thirty the previous evening?

A. Right. Yes.

Q. Now you mentioned, a young boy, Rickie, did you not?

A. Yes.

Q. Do you recall in the preliminary examination, page ninety, Counsel, being asked this question: "Now there was a young boy around there. Who was that? Answer—

Rickie. Question—Who? Answer—Rickie. Question—Any relation to you? Answer—No. Question—Friend? Answer—Yeh. Question—Live with you in the same house? Answer—I'd rather not say." Were you asked those questions and did you make those answers?

A. Right.

Q. Question "Do you know whose son he is? Answer—Yeh. Question—Whose son is he? Answer—I'd rather not say that too." Do you recall those answers?

A. Yes.

Q. Actually also in the preliminary examination you said that (230) Mr. Tucker was supposed to have said that he had something to do with a widow or divorcee?

A. Right.

Q. Which type of person were you living with? Were you living with a widow or divorcee?

A. I give my address as 590 Upland.

Q. Who were you living with, a widow or divorcee?

A. My mother.

Q. That is, who is Rickie's parent?

A. What do you mean?

Q. Who is this woman that you'd rather not say?

A. A friend of mine.

Q. A friend of yours that was on ADC?

A. Could be.

Q. Wasn't that a fact?

A. I don't know her business.

Q. As a matter of fact, weren't you afraid that this ADC would be lost if this testimony came out?

A. No, I am not afraid of it.

Q. You mean it has?

A. Because I didn't know she was on ADC.

Q. Why were you afraid to tell the Court who that was?

A. I'd just rather not get her involved in it.

(231) Q. Because you were carrying on an illicit relationship with her, weren't you?

A. What do you mean?

Q. I mean you were carrying on an extra-marital relationship with her, were you not?

A. Because I went over and seen her or something?

Mr. Roberts: If the Court please, I know this is Cross Examination. I fail to see that this is material with the case that we have today. He has been interrogated with whom he was living with and whether or not this party may or may not have been receiving subsidies from ADC and I think it's totally irrelevant with the case with which we are concerned.

Mr. Vanderkloot: There is nothing about this name that should hurt unless there is something he is hiding about this relationship.

The Court: The question as you asked it would require that the witness be advised of his Constitutional Rights when you ask whether he is carrying on an illicit affair.

Q. I will advise you any statement you make in the presence of this Jury and before the Court, if it tends to incriminate you, you need not make such an answer because such an answer might (232) be used against you in a court of law in order to convict you of a crime. However, the Court can instruct me here if I am mistaken, and I really wonder, your Honor, if I mis-state something, please correct me.

The Court: The witness should know he is not required to testify as to any matter which might tend to incriminate him. You may answer the question or indicate your Constitutional protection.

(Last question read by reporter.)

The Court: Do you wish to answer or not?

A. No, I wasn't.



Q. Weren't you in fact having intercourse with this woman?

A. No, I wasn't.

Q. Didn't you plan to marry her although you already had a wife?

A. No.

Q. You deny these things?

A. Yes.

Q. That's why you were afraid to mention her name?

A. I am not afraid to mention her name. I don't need to mention her name now.

(233) Q. The Officers had occasion to talk to you before the preliminary examination about your testimony?

A. Repeat that.

Q. Did the Officers on this case have occasion to talk to you before this preliminary examination about your testimony?

A. They just asked me what happened. That was it.

Q. In fact, weren't you asked about some other matters that you have been involved in?

A. If what?

Q. Weren't you asked about some other matters that you were involved in?

A. No.

Q. In fact weren't you told that you would be prosecuted if you didn't testify?

A. They ain't going to prosecute me for nothing.

Q. Have you ever been caught by a wild one?

A. Pardon me?

Q. Have you ever been caught with a wild one?

Mr. Roberts: I object, your Honor. It's totally irrelevant. It has nothing to do with this case.

Q. Do you normally indulge in this kind of conversation in front of five-year-old-children?

A. No, but I think a five-year—

(234) Q. But you thought that was a good time to do it, is that it?

A. Yeah. I thought about it and I asked it.

Mr. Vanderkloot: Fine. Thank you very much.

*Re-direct Examination*

Conducted by Mr. Roberts:

Q. You were asked on Cross Examination whether or not you had ever talked to any Police Officers, right?

A. Right.

Q. You are under oath. First of all, let me ask you this: how long have you known the Defendant?

Mr. Vanderkloot: Your Honor, may we approach the Bench?

The Court: Yes.

Mr. Roberts: I will withdraw the question.

Q. Is the Defendant a friend of yours? Just "yes" or "no".

A. Yes.

(235) Q. And has been for some time? Just "yes" or "no"?

Mr. Vanderkloot: The Prosecutor is leading his own witness.

Mr. Roberts: I will withdraw the question.

Q. Has he been a friend for more than ten years? Yes or no?

A. Yes.

Q. Now you were asked on Cross Examination whether or not you had been questioned by Police Officers, right?

A. Yes.

Q. And you are under oath here, sworn to tell the truth, right?

A. Yes.

Q. Did any Police Officer, and I want you to tell the Ladies and Gentlemen of this Jury and the Court, ever advise you to lie?

A. No.

Mr. Vanderkloot: Object. That is leading. That is attempting again to bolster the credibility of his res gestae witness. I agree it's weak, your Honor, but the question is leading and it is suggestive and it allows the Prosecutor to testify for the witness.

The Court: The question was somewhat leading. However, the answer has been given and it may stand, but do avoid leading questions.

(236) Mr. Roberts: Yes, sir. I have no further questions.

The Court: Mr. Roberts, will your next witness take some time?

Mr. Roberts: It might take longer than the seven minutes we have left.

The Court: Court will be adjourned until nine o'clock  
(Court adjourned.)

**VI. STIPULATION OF OPPOSING COUNSEL,  
JULY 14, 1967**

**STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE  
COUNTY OF OAKLAND**

People of the State of Michigan,	}	No. CR 2087
Plaintiff,		
vs		
Thomas Wayne Tucker,		
Defendant.		

**STIPULATION**

It is hereby stipulated and agreed by Defendant and the People that the identity and location of Robert Henderson, witness for the People in this cause and his connection with this matter was learned only through the interrogation of Defendant and that prior to learning the identity of Robert Henderson and as part of that interrogation, Defendant was advised by the police officers only as indicated from pages 97 through 100 of the Preliminary Examination dated May 13, 1966.

Agreed as to form and substance:

/s/ Dennis Donohue

Assistant Prosecuting Attorney  
Oakland County Court House  
1300 N. Telegraph Road  
Pontiac, Michigan 48053

/s/ William R. Vanderkloot

Attorney for Defendant  
801 South Adams Road  
Birmingham, Michigan 48011

Dated: July 14, 1967

647-7232

**Supreme Court of the United States**

**No. 73-482**

**Michigan,**

**Petitioner,**

**v.**

**Thomas W. Tucker**

**ORDER ALLOWING CERTIORARI. Filed December 3 -----, 19 73.**

The petition herein for a writ of certiorari to the United States Court of Appeals for the **Sixth -----** Circuit is granted.

**FILE COPY**

**FILED**

**SEP 14 1973**

**WOMEN WORK, R. CLIF**

**IN THE**  
**Supreme Court of the United States**  
**SEPTEMBER TERM, 1973**

**No. 73-482**

**STATE OF MICHIGAN,**  
**Petitioner,**

**v.**

**THOMAS W. TUCKER,**  
**Respondent.**

**PETITION FOR A WRIT OF CERTIORARI**  
**TO THE UNITED STATES COURT**  
**OF APPEALS FOR THE**  
**SIXTH CIRCUIT**

**L. BROOKS PATTERSON**  
**Prosecuting Attorney**  
**Oakland County**  
**State of Michigan**

**By: ROBERT C. WILLIAMS**  
**Chief Appellate Counsel**  
**Attorneys for the Petitioner**



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IN THE  
**Supreme Court of the United States**

SEPTEMBER TERM, 1973

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No.

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STATE OF MICHIGAN,  
Petitioner,

v.

THOMAS W. TUCKER,  
Respondent.

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**PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT  
OF APPEALS FOR THE  
SIXTH CIRCUIT**

---

Now comes L. Brooks Patterson, Prosecuting Attorney in and for the County of Oakland, State of Michigan, by Robert C. Williams, Chief Appellate Counsel, and prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on June 21, 1973.

### CITATIONS TO OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit was filed on June 21, 1973. The decision of the United States District Court, Eastern District of Michigan, Southern Division, was filed on December 22, 1972. The opinion of the Supreme Court of the State of Michigan was filed on August 27, 1971, and is reported at 385 Mich 594; 189 NW2d 290 (1971). The opinion of the Michigan Court of Appeals was filed on October 1, 1969, and is reported at 19 Mich App 320, 172 NW2d 712 (1969). Copies of all four opinions of the lower courts are included in the Appendix to this, Petitioner's Petition for Writ of Certiorari.

### JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit was filed on June 21, 1973. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

### QUESTIONS PRESENTED

#### I.

Whether the testimony of a witness is inadmissible under the "poisonous fruits" doctrine when that witness' identity was discovered through a proper pre-*Miranda* interrogation of the defendant which did not meet the standards subsequently set forth in *Miranda v Arizona*?

## II.

Whether the standards set forth in *Miranda v Arizona* are too restrictive in excluding admissions and are not mandated by the United States Constitution?

**CONSTITUTIONAL PROVISION INVOLVED**

The constitutional provision which the above-entitled Petition involves is as follows:

Constitution of the United States, Amendment V:

“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

**STATEMENT OF FACTS**

On April 19, 1966, Miss Marion Corey was found tied, gagged and partially disrobed in her Pontiac Township home by a friend and co-worker, Luther White (R. 44-46). Miss Corey, a 43-year-old lady who lived alone and was a virgin, had been severely beaten and was incoherent. She has never been able to recall what happened to her and has never identified the defendant or anyone else as her assailant.

When Mr. White arrived, he discovered a dog inside Miss Corey's house (R. 60-62), though she did not own one herself (R. 66). Police followed the dog, Sugarfoot, to the defendant's house where it curled up on the porch. Questioning of neighbors by police revealed that the dog belonged to the defendant who lived in that house (R. 102-108). Defendant was located later that day and picked up by the police.

When the defendant was taken to police headquarters, scratches were observed on his face (R. 175) and blood was found on his clothes and undershorts (R. 197-199). He told police that the scratches and blood were caused by a goose he had killed.

Prior to interrogating the defendant on April 19, 1966, the police advised him that he had the right to remain silent and the right to contact a lawyer. He was not advised of any right to a court-appointed attorney. Defendant agreed to talk with the police and told them that at the time of the crime he was with a friend, one Robert Henderson.

The police contacted Henderson in an attempt to confirm the defendant's alibi. Henderson not only refuted the alibi, but also related certain incriminating statements made in his presence by the defendant.

*Miranda v Arizona*, 384 US 436 (1966) was decided by this Court on June 13, 1966. Defendant's trial commenced after that date. As a result, the statements made by the defendant to police were excluded as being in violation of *Miranda, supra*. Henderson, however, did testify as a witness for the prosecution. Henderson stated that the defendant arrived at his house on the day of the crime at about 1:00 p.m., while he, Henderson, was cleaning

a goose he had shot (R. 217-218). Henderson asked the defendant what had happened to his face and whether he had got ahold of "a wild one or something." The defendant replied "something like that" (R. 223). After a few minutes Henderson asked "who it was" and the defendant replied "She's a widow woman" who was in her thirties and lived the next block over (R. 224-225). It was stipulated to by the Prosecution that knowledge of Henderson was obtained through the statements made to the police by the defendant.

The defendant was convicted of rape by the jury and was sentenced to a term of 20 to 40 years imprisonment. In unanimous opinions included in Petitioner's Appendix, the Michigan Court of Appeals and the Michigan Supreme Court affirmed the defendant's conviction. The United States District Court, Eastern District of Michigan, granted the defendant's petition for a writ of habeas corpus stating that Henderson's testimony had been wrongly admitted into evidence at trial. The United States Court of Appeals for the Sixth Circuit affirmed the decision of the United States District Court. The decisions of both federal courts are also included in Petitioner's Appendix.

## REASONS FOR GRANTING THE WRIT

### I.

The first question presented by Petitioner is an important federal constitutional question which has been noted, but never answered by this Court. This Petition presents squarely the issue of whether the testimony of a witness whose identity was obtained through the violation of a defendant's Fifth Amendment rights should be suppressed.<sup>1</sup> This is a question which is arising with increasing frequency in both state and federal courts. The wide range of judicial opinion concerning this issue justifies its review in this Honorable Court.

Conflicting opinions as to this federal issue have come from state appellate courts, United States District Courts, and United States Courts of Appeal. Only this Court has yet to enter the field. In the instant case, there is a clear conflict as to the interpretation of the Fifth Amendment of the United States Constitution between the Supreme

---

<sup>1</sup> In passing, it should be noted that the police officers who advised the defendant of his constitutional rights prior to interrogation complied with all judicial mandates in existence at that time. *Miranda v Arizona, supra*, was not decided until nearly two months after the questioning of this defendant took place. Therefore the exclusionary rule as a deterrent of illegal police conduct has no application to this case. Though the police interrogated the defendant in a legal manner at the time they questioned him, the warnings given by the police became insufficient subsequently because of the *Miranda* decision. *Miranda, supra*, was applied to this case because in *Johnson v New Jersey*, 384 US 719 (1966), this Court held that *Miranda, supra*, would be applicable to all cases that went to trial after the decision date of *Miranda, supra*. Thus, though the interrogation of the defendant took place prior to *Miranda, supra*, the lower courts have reasoned that the *Miranda* rationale also governs this case.

Court of Michigan and the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit has imposed a more restrictive interpretation of the Fifth Amendment upon the People of Michigan than this Court or the Michigan Supreme Court has ever ruled proper. In affirming defendant's conviction for a brutal rape, the Michigan Supreme Court correctly stated that this Court has never extended the "poisonous fruits" doctrine to include the trial testimony of a witness other than the accused. Such a holding has firm roots in *Smith v United States*, 324 F2d 879 (DC Cir., 1963). In *Smith, supra*, writing for the majority, then Judge, now Chief Justice, Burger concluded that the testimony of an eyewitness or of a factual witness need not be excluded because his identity was discovered as a result of a statement made by the accused during an illegal detention.

Then Judge Burger stated:

"Here no confessions or utterances of the appellants were used against them; tangible evidence obtained from appellants, such as the victim's watch, was suppressed along with the confessions. But a witness is not an inanimate object which like contraband narcotics, a pistol or stolen goods, 'speak for themselves.' The proffer of a living witness is not to be mechanically equated with the proffer of inanimate evidentiary objects illegally seized. The fact that the name of a potential witness is disclosed to police is of no evidentiary significance, per se, since the living witness is an individual human personality whose attributes of will, perception, memory and volition interact to determine what testimony he will give." (Footnote omitted). *Smith v United States, supra*, at p. 881.



Petitioner submits that this was the correct interpretation of the Fifth Amendment of the United States Constitution and of its extension under the "fruits of the poisonous tree", doctrine.

The holding in *Smith, supra*, was reaffirmed in *Brown v United States*, 375 F2d 310 (DC Cir. 1967). Concurring, then-Judge Burger stated the same logic which the Michigan Supreme Court relied upon in the instant case:

"The critical aspect of *Smith-Bowden* is that live witnesses are not 'suppressed', as inanimate objects may be. When an eyewitness is willing to give testimony, under oath and subject to all the rigors of cross-examination and penalties of perjury, he must be heard. *How he came to be in court is a matter which goes only to the weight, not the admissibility, of his testimony.*" (Emphasis supplied). *Brown v United States, supra*, at p. 319.

*Smith, supra* and *Brown, supra*, illustrate that the United States Court of Appeals for the District of Columbia and the Chief Justice of the United States Supreme Court agree with the constitutional interpretation of the Michigan Supreme Court. The United States Court of Appeals for the Sixth Circuit, however, disagrees and on the same facts imposes a more restrictive interpretation of the Fifth Amendment and its extension under the "poisonous fruits" doctrine.

The Sixth Circuit relied upon *Wong Sun v United States*, 371 US 471 (1963) in affirming the decision of the United States District Court in this matter. One of the more recent cases decided involving this issue also lends support to the decision of the Sixth Circuit. Curiously enough, the case, *United States v Alston*, 311 F. Supp 296 (DC Cir. 1970), arose out of the United States

District Court, District of Columbia, and rejected the underlying rationale set forth by then-Judge Burger in *Smith, supra*, and *Brown, supra*. After a review of applicable legal authorities, Judge Gesell concluded that this constitutional issue represents an area in which the United States Supreme Court has yet to provide any guidance:

"None of the Supreme Court cases have dealt specifically with the simple fact situation of a complaining witness whose identity is learned through illegal means and who, quite naturally, agrees to testify upon being contacted. The three leading cases involved either tangible evidence or testimony of a co-defendant. In the factual context of this case, neither the *Wong Sun* standard nor earlier statements of the rule articulate a clear basis for determining when testimonial evidence is sufficiently purged of the primary taint (and thus attenuated) and when it is the product of exploitation. *The Supreme Court has, in short, not been faced with the fundamental choice, necessary in this context, between two conflicting theories:* (1) that contact by the police of a witness whose identity is immediately obtained from the illegal article is by itself a form of exploitation of the primary illegality such that subsequent testimony must be suppressed; or (2) that the decision of a witness to testify and the jury's evaluation of his testimony are independent, intervening factors which attenuate the taint." (Emphasis supplied). *United States v Alston, supra*, at p. 298.

This issue will continually be resolved in differing manners in state supreme courts, federal trial courts, and federal appellate courts until this Honorable Court offers a definitive opinion as to the admissibility of the testimony of such a witness.

The conflicting opinions concerning this important constitutional issue have been discussed to illustrate the need for action by this Honorable Court. The Michigan Supreme Court and the United States Court of Appeals for the Sixth Circuit are in direct conflict. The Sixth Circuit and the United States Court of Appeals for the District of Columbia are in direct conflict. The District of Columbia Circuit and the United States District Court, District of Columbia, are in direct conflict. The existence of such conflicts point out that this issue is ripe for consideration by this Court.

Though admittedly a secondary consideration before this Court, this Petitioner, as an elected official, would be derelict in his duties if he did not present the fact that this is also an extremely important case to the People of the State of Michigan. Due to the *habeas corpus* powers of the federal courts, the People of Michigan are now the aggrieved party, unless this Court acts. A vicious rapist will be turned loose even though a unanimous Michigan Supreme Court has affirmed his conviction.

In fairness to all the lower courts that have ruled in this case, each has noted that there exists no definitive opinion concerning this federal constitutional question. Each court has had to resolve the issue based upon its own judgment. The United States District Court judge pointed this out succinctly in his opinion. After reviewing the leading cases concerning "the fruits of the poisonous tree," the judge set forth the following quotation from this Court's opinion in *Harrison v United States*, 392 US 219 (1968):

"We have no occasion in this case to canvass the complex and varied problems that arise when the trial testimony of a witness other than the accused

is challenged as 'the evidentiary product of the poisoned tree.'" (Footnote 9) *Harrison v United States, supra*, at p. 223.

This complex and varied problem is presented squarely to this Honorable Court in this Petition for a Writ of Certiorari.

## II.

Petitioner is well aware that this Court set forth certain standards which must be met to protect a defendant's Fifth Amendment rights in *Miranda v Arizona, supra*. While in total agreement that such an important constitutional right must be carefully protected, Petitioner urges that confessions may be intelligently and voluntarily made, in some instances, even absent the *Miranda* warnings.

In the instant case, no confession was ever made, but information was given to the police by the defendant which resulted in the discovery of a key witness. Petitioner submits that such information was voluntarily and intelligently given even though the defendant was not advised of his right to a court-appointed lawyer. This Court, in *Harris v New York*, 401 US 222 (1971), illustrated a willingness to allow evidence to be admitted in some circumstances when proper *Miranda* warnings had not been given. Petitioner urges that the instant case presents a factual situation that would merit such an interpretation of *Miranda, supra*.

**CONCLUSION**

WHEREFORE, Petitioner respectfully requests that this Honorable Court grant Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

L. BROOKS PATTERSON

Prosecuting Attorney

Oakland County

State of Michigan

By: ROBERT C. WILLIAMS

*Chief Appellate Counsel*

## APPENDIX

OPINION OF THE UNITED STATES COURT  
OF APPEALS

(U. S. Court of Appeals—Sixth Circuit)

(Filed June 21, 1973)

Thomas W. Tucker,

*Petitioner-Appellee,*

v.

Perry Johnson, Warden,

State Prison of Southern Michigan,

*Respondent-Appellant.*

Civil Action

#37533

Before: Celebrezze, Miller and Lively, Circuit Judges.

This is a 28 U.S.C. Sec. 2254 proceeding in which the petitioner challenged his conviction for rape, in a state court trial. The petition was granted by the district court without an evidentiary hearing. Without a full *Miranda* warning, the Petitioner gave the investigating officers the name of an "alibi" witness. However, this witness did not support the alibi and the evidence was offered and admitted against the Petitioner in his state court trial.

We agree with the district court's holding that this evidence was "fruit of the poisonous tree" and was admitted in violation of the Petitioner's constitutional rights enunciated in *Wong Sun v. United States*, 371 U.S. 471 (1963). On this issue we are in full agreement with the opinion of the district court.

We also agree with the district court that the admission of this evidence was not harmless error beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18 (1967).

Since the parties stipulated that there was no independent source for the state to acquire knowledge of the witness, and since the case was presented to the district court upon a motion to dismiss supported by an affidavit and by the files and record of the state court trial, the respondent is not in a position to complain because the district court did not hold a formal evidentiary hearing.

The judgment of the district court is hereby **AFFIRMED**.

Entered by Order of the Court

/s/ James A. Higgins,  
Clerk.

# **OPINION OF THE UNITED STATES DISTRICT COURT**

Entered December 22, 1972

(U. S .District Court—Eastern District of Michigan—  
Southern Division)

(Filed December 26, 1972)

Thomas W. Tucker,

*Petitioner,*

v.

Perry Johnson, Warden,

State Prison of Southern Michigan,

*Respondent.*

This is a petition for a writ of habeas corpus filed by Thomas W. Tucker, an inmate of Southern Michigan Prison, serving a twenty to forty-year sentence for the crime of rape following conviction by a jury in a Michigan State Court. He has exhausted all available state remedies.

On April 19, 1966, Marion Corey was found tied, gagged and partially disrobed in her home by a friend, Luther White. She had been severely beaten and was incoherent. She was 43 years old and lived alone. She has never recalled what happened to her and has never identified the petitioner or anyone else as her assailant.

When White arrived, he discovered a dog inside the house. Later the dog was seen outside the house. Police followed it to petitioner's house where it curled up on the porch. Questioning of the neighbors revealed that the dog belonged to petitioner and his parents who lived in the house. On the basis of this information, petitioner was picked up by police.

When petitioner was taken to police headquarters, scratches were observed on his face and blood was found on his clothing. He told the police that the scratches and blood were caused by a goose that he had killed. At trial his work foreman testified that petitioner had told him the same story. However, there was testimony that tests conducted on the blood stains on his clothing indicated that it was human blood.

Petitioner was interrogated by the police after his arrest. Although they warned him that he had the right to remain silent, they omitted any statement of his right to court-appointed counsel. During the interrogation, petitioner stated that at the time of the crime he was with a friend, Robert Henderson. The police attempted to confirm this alibi and contacted Henderson who told police that he was not with petitioner at the time in question. In fact, Henderson told police that when petitioner came to his house later in the day of April 19, his face was covered with scratches. When Henderson inquired of petitioner "if he got hold of a wild one or something," petitioner



replied, "Something like that." Henderson waited a few minutes and asked petitioner who it was. Petitioner responded that it was "some woman who lived the next block over. She is a widow woman—in her thirties or something."

On the trial of the case, the statements made by defendant to the police were not admitted because they were held to have been taken in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). The interrogation on April 19, 1966 preceded the *Miranda* decision. But petitioner's trial was subsequent to the rendering of the opinion in *Miranda* on June 13, 1966, and in *Johnson v. New Jersey*, 384 U.S. 719 (1966), the court held *Miranda* to be applicable to trials commencing subsequent to that date. Thus, the *Miranda* decision was applicable to statements taken from petitioner and sought to be introduced at trial. Although the trial court excluded those statements, it allowed the introduction of testimony by Henderson on the prosecution's case in chief. The substance of this testimony is set forth above. The prosecution's knowledge of Henderson was admittedly obtained only through those statements made by petitioner without a proper warning of his constitutional rights.

Petitioner now raises an issue thus far not considered by the Supreme Court, namely, does the introduction by the prosecutor in its case in chief of testimony of a third person which is admittedly the fruit of an illegally obtained statement by the petitioner, violate petitioner's Fifth Amendment rights? Reluctantly, we hold that it does and that, therefore, the writ must be granted.

What we are essentially deciding in this case is whether or not the exclusionary rule shall be extended to cases of this kind. Beginning with *Silverthorne Lumber Company*,

*Inc. v. United States*, 251 U.S. 385 (1920), the Supreme Court has consistently held that the prosecution may not prove its case through illegally obtained evidence or any derivative thereof. As Justice Holmes said in *Silverthorne*, at p. 392:

“The evidence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source, they may be proved like any others, but the knowledge gained by the government’s own wrong cannot be used by it in the way proposed.”

This rule was expanded in *Wong Sun v. U.S.*, 371 U.S. 471 (1963), in which case the court held that testimonial evidence elicited from the petitioner Toy at the time of his illegal arrest was inadmissible and should have been excluded. Thus, the “fruits” of Fourth Amendment violations were held inadmissible. In *Wong Sun*, the court went further and held that narcotics obtained as a result of Toy’s statement should have been excluded as a fruit of the original illegal arrest. Thus it is clear that evidence obtained from statements elicited in violation of Fourth Amendment rights is inadmissible.

In *United States v. Wade*, 388 U.S. 218 (1967), and *Gilbert v. California*, 388 U.S. 263 (1967), the court held an in-court identification by a witness who had viewed defendant-petitioner at a line-up before trial in the absence of counsel in violation of petitioner’s Sixth Amendment rights should have been excluded from trial. Of course, if the in-court identification was not based on the previous

line-up, but of independent origin, the court said that the in-court identification would be proper. The court remanded the cases to give the prosecution an opportunity to demonstrate that the in-court identification was made independently of the pre-trial line-up. In *Gilbert*, the court went on to say, however, that testimony of witnesses at trial stating that they had identified the defendant at the pre-trial line-up had to be excluded since the line-up of which they testified was illegal. "That testimony is the direct result of the illegal lineup 'come at by exploitation of [the primary] illegality.' *Wong Sun* . . ." (brackets not inserted). Thus it is clear that testimony of third parties which is obtained as the result of a violation of Sixth Amendment rights of the accused, cannot be introduced against the accused at trial.

In a situation involving the Fifth Amendment, the Supreme Court has held that testimony of an accused could not be introduced at a subsequent trial where the testimony at the first trial was induced by use of accused's confession taken in violation of the Fifth Amendment. Thus, in *Harrison v. United States*, 392 U.S. 219 (1968), the court said, "[T]he petitioner testified [at trial] only after the Government had illegally introduced into evidence three confessions, all wrongfully obtained, and the same principle that prohibits the use of confessions so procured also prohibits the use of any testimony impelled thereby—the fruit of the poisonous tree, to invoke a time-worn metaphor." Citing *Silverthorne Lumber, supra*. The court noted, however, in footnote 9 on page 223, that,

We have no occasion in this case to canvass the complex and varied problems that arise when the trial testimony of a witness other than the accused is challenged as "the evidentiary product of the poisoned tree."

The case described in the footnote is precisely the case before this Court.

On the basis of these cases, this Court finds that the testimony of Henderson should have been excluded from petitioner Tucker's trial. We find no distinction between the value placed upon the Fourth, Fifth and Sixth Amendments. Thus, if testimonial fruits of violation of the Fourth and Sixth Amendments may not be introduced into evidence at trial, testimonial fruits obtained from violations of Fifth Amendment rights should also be inadmissible.

We are aware that the Supreme Court has indicated in the case of *Harris v. New York*, 401 U.S. 222 (1971), that *Miranda* does not prevent all uses of a statement taken without the required warning. In *Harris*, the court held that statements taken in violation of *Miranda*, although inadmissible on the prosecution's case in chief, could be used on cross-examination of the defendant for purpose of impeaching his credibility. But the court seemed quite concerned with the fact that no use of the statements was made during the prosecution's case in chief. Thus, whatever inroads have been made on the collateral uses of *Miranda*, it is nevertheless clear from *Harris* that what the prosecution does on its case in chief will still be carefully scrutinized.

The purpose of the exclusionary rule of course is to deter illegal police conduct and to prevent the acquisition of evidence through the violation of a defendant's constitutional rights. Justice White argued in his dissent in *Harrison* that the *Miranda* rule excluding all statements procured in custody without adequate warning is so clear and so strong that no additional deterrent was necessary under the facts of that case. It could be argued in our

case that no officer would chance violating *Miranda* in the hope of obtaining leads to other inculpatory evidence.

But we are not impressed with this argument. Whatever the motivation of a government agent in failing to warn a defendant, the government should not be allowed to benefit from the violation of the defendant's rights.

We note that the defendant's statement to the police which led to the discovery of Henderson was basically exculpatory in nature. In fact, it constituted an alibi that the police were duty bound to investigate. Nevertheless, both exculpatory and inculpatory statements are covered by *Miranda*, 384 U.S. at 476-477. Moreover, as pointed out by the Supreme Court in *Wong Sun*, 371 U.S. at 487, although the statement was exculpatory, it "turned out to be incriminating, for [it] led directly to evidence which implicated [petitioner]." Thus, we find the exculpatory nature of these statements to be irrelevant.

Of course, the statements excluded in *Wong Sun* and *Harrison* were those of the defendants whose rights were violated. But in *Wade* and *Gilbert* the testimony excluded was that of third persons. Thus the fact that a third person's testimony as opposed to petitioner's testimony is at issue is not significant. The testimony is no less the result of the illegal interrogation merely because it was made by a third party.

Having determined that the testimony in question was inadmissible at petitioner's trial, we must nevertheless consider whether or not this error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18 (1967). We have read the transcript of petitioner's trial and conclude that Henderson's testimony was crucial to the prosecution's case. The error in receiving this testimony was not harmless beyond a reasonable doubt.

For these reasons, IT IS HEREBY ORDERED that the writ be and is hereby granted and petitioner shall be released from custody within ninety (90) days from this date unless a new trial is commenced within that time.

/s/ Ralph M. Freeman  
Ralph M. Freeman  
United States District Judge.

Dated: December 22, 1972.

## OPINION OF THE MICHIGAN SUPREME COURT

### *People v. Tucker*

Appeal from Court of Appeals, Division 2, Lesinski, C.J., and Quinn and Danhof, JJ., affirming Oakland, Clark J. Adams, J. Submitted June 10, 1971. (No. 13 June Term 1971, Docket No. 52,674 $\frac{1}{2}$ .) Decided August 27, 1971.

19 Mich App 320 affirmed.

Thomas Wayne Tucker was convicted of rape. Defendant appealed to the Court of Appeals. Affirmed. Defendant appeals. Affirmed.

*Frank J. Kelley*, Attorney General, *Robert A. Derengoski*, Solicitor General, *Thomas G. Plunkett*, Prosecuting Attorney, and *Dennis Donohue*, Chief Appellate Counsel, for the people.

*William R. Vander Kloot* and *Charles J. Porter*, for defendant.

Black, J. (*for affirmance*). To the extent one Justice of this Court may so do, I adopt the carefully detailed and thoughtfully considered opinion of Judge Danhof, writing for Division 2 (19 Mich App 320), and therefore vote to affirm.

When and if the United States Supreme Court rules that the otherwise admissible testimony of a disinterested witness, such as Mr. Henderson gave here (see 19 Mich App at 324), must be rejected as fancied or authentic "fruit" of that rhetorized "poisonous tree", I will follow obediently our uniformly executed oath. But that day has not quite yet arrived, as the counsel on appeal for defendant concede\* in the course of their effort to persuade that *this* Court should extend—"logically" of course—the rules of exclusion that were laid down in *United States v. Wade* (1967), 388 US 218 (87 S Ct 1926, 18 L Ed 2d 1149), and in *Wade's* companion, *Gilbert v. California* (1967), 388 US 263 (87 S Ct 1951, 18 L Ed 2d 1178).

An unusually strong showing of guilt, echoed by the jury's verdict, discloses that this professional felon committed a loathsomely bestial rape of a middle aged lady. There alone in her own home, she must have fought valiantly before submission or unconsciousness, for scratches of the defendant's face were so noticeably marked, by successive witnesses hours later, as to form an important part of the people's proof. The result of her defensive effort was a beating so vicious that she was unable to recall what happened or to identify her assailant. In the absence of reversible error—of which there simply is none—that assailant should not be granted a new trial; a new trial which, in these days of more and more shackling of law enforcement, usually means an order for out-

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\* Counsel say, forthrightly in their brief:

"While both *Wade* and *Gilbert* involved verbal evidence of witnesses they did not consider the primary issue involved here, namely, whether in the absence of lineup or search problems, the identity of a witness discovered during illegal interrogation taints the witness's subsequent testimony and requires its exclusion."

right release upon society of one whose record justifies the latest sentence imposed.

Adams, T. E. Brennan, Swainson and Williams, JJ., concurred with Black, J.

T. M. Kavanagh, C.J., and T. G. Kavanagh, J., concurred in the result.

## OPINION OF MICHIGAN COURT OF APPEALS

### *People v. Tucker*

#### 1. *Constitutional Law—Fourth Amendment—Evidence—Illegal Acquisition—Use.*

The essence of the Fourth Amendment to the United States Constitution, which forbids the acquisition of evidence in a certain way, requires that illegally acquired evidence not only shall not be used in court, but also that it shall not be used at all.

#### 2. *Evidence—Exclusionary Rule.*

The federal "exclusionary rule", forbidding the use of illegally acquired evidence, extends to verbal statements as well as to tangible materials.

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#### REFERENCES FOR POINTS IN HEADNOTES

- [1] 29 Am Jur 2d, Evidence §§ 410-412.
- [2] 29 Am Jur 2d, Evidence § 414.
- [3] 29 Am Jur 2d, Evidence § 416.
- [4] 29 Am Jur 2d, Evidence §§ 416, 440.
- [5] 29 Am Jur 2d, Evidence §§ 415, 531.
- [6] 5 Am Jur 2d, Arrest § 1.
- [7] 29 Am Jur 2d, Evidence §§ 249, 259, 288, 298.
- [8] 30 Am Jur 2d, Evidence § 1140 *et seq.*



### 3. *Evidence—Witnesses—Identity—Exclusion.*

That the identity of a witness was learned by illegal means is insufficient to warrant exclusion of that witness's testimony, inasmuch as mere knowledge of that witness's identity does not guarantee that his testimony would be favorable to the prosecution; the court should weight all the relevant factors including the possibility that the witness might have voluntarily contacted police even without their knowing his identity and the fact that his testimony has remained unchanged from the start.

### 4. *Criminal Law—Evidence—Witnesses—Alibi—Admissibility.*

The testimony of an alibi witness whose name was given to police by defendant was admissible where the police officers were fulfilling their duty towards defendant in checking his alibi since it could be expected that the alibi witness's testimony would be favorable to the defendant, whose in-custody interrogation was within the guidelines set by the United States Supreme Court as expressed up to that time.

### 5. *Criminal Law—Evidence—"Fruit of the Poisonous Tree"—Purpose.*

One purpose of the rule excluding "fruit of the poisonous tree" is to deter unlawful police conduct but no such deterrent effect could be obtained by extending the rule to the case of one accused of rape where his custodial interrogation about that crime complied with the United States Supreme Court guidelines as expressed up to that time.

6. *Criminal Law—Suspect—Detention—Examination—Driver's License—Arrest.*

Police officer's action in stopping defendant to examine his driver's license after being advised of the name of a person wanted for questioning in a rape and make of an auto being driven by him was not an arrest, there being no intent by the officer to take defendant into custody until after the officer had learned the defendant's name from his license.

7. *Criminal Law—Witnesses—Testimony—Identification—Jury—Weight.*

Witness's identification of a dog that he had seen in the home of a rape victim as being the same dog later identified as belonging to the defendant charged with the rape was based on an original observation and was admissible, the weight to be given to the testimony being for the jury.

8. *Criminal Law—Rape—Corpus Delecti—Testimony—Victim—Physician.*

The *corpus delecti* in forcible rape cases is usually established by the victim's testimony but where the victim is unable to remember what happened, a physician's testimony that the victim's hymen had been ruptured within hours of his examination and that sperm were present in her vagina, plus the fact that she was discovered tied, gagged, beaten and incoherent, will establish the *corpus delecti* (MCLA § 750.520).

Appeal from Oakland, Clark J. Adams, J. Submitted Division 2 May 9, 1969, at Lansing. (Docket No. 5,019). Decided October 1, 1969. Application for leave to appeal filed December 17, 1969.

Thomas Wayne Tucker was convicted of rape. Defendant appeals. Affirmed.

*Frank J. Kelley*, Attorney General, *Robert A. Derengoski*, Solicitor General, *Thomas G. Plunkett*, Prosecuting Attorney, and *Dennis Donohue*, Chief Appellate Counsel, for the people.

• *Bratton, Vander Kloot & Young*, for defendant.

Before: Lesinski, C.J., and Danhoff and Quinn, JJ.

Danhof, J. The first trial of defendant ended in a mistrial for reasons not presently relevant. The second trial resulted in a jury conviction of rape<sup>1</sup> and a sentence on November 9, 1966, of 20 to 40 years imprisonment. The defendant has brought this appeal alleging 8 errors of law which will be discussed *seratim* following a recapitulation of the essential facts.

On April 19, 1966, the victim did not report for work and a male co-worker and friend, Luther E. White, telephoned her home to ascertain the reason for her absence. Receiving no answer, he went to her home in Pontiac township and discovered the victim tied, gagged, and brutally and bloodily beaten. She was partially disrobed and incoherent. The house was in a general and bloody disarray. The victim was 43, had never been married, and lived alone. Neither then nor later could she recall what had happened to her, nor could she identify the defendant.

A dog was in the home at the time Mr. White entered, although, to his recollection, the victim owned no dog. He testified that the dog later got out of the house. Shortly thereafter White was reporting the above facts to an Oakland county sheriff's deputy at the scene when he saw

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<sup>1</sup> MCLA § 750.520 (Stat Ann 1954 Rev § 28.788).

the same dog. The deputy followed the dog to a home, approximately 900 feet away on a zig zag course, where the dog sat down in the front yard. Finding no one at home, the deputy checked with a neighbor who told him that the defendant and his relatives lived at the house and that the dog belonged to them, and that defendant drove a red 1959 Ford. The deputy telephoned his information to the sheriff's department about noon.

At 4 p.m. that day Officer Lindberg of the Pontiac police department telephoned the Oakland county sheriff's department and learned of the crime from an unnamed person, and that a certain named suspect was driving a red 1959 Ford. At approximately 9 p.m. the same day, Officer Lindberg saw a red 1959 Ford automobile leaving the city and entering Pontiac township. The officer had no knowledge of defendant's physical description and had not observed any traffic violation, but he ordered the car to stop and demanded the driver's license of the operator, who was the defendant. The officer noted that the last name on the license was the same as that given him by the sheriff's department, but that the first and middle names were reversed. The defendant was taken to the sheriff's department where scratches were observed on his face and blood on his clothes, including his underclothing.

Defendant was advised of his right to remain silent and related matters, but he was not advised that he had a right to a court-appointed attorney if he was too poor to afford one himself. He was interrogated and said that at the time the crime was committed he was with Robert Henderson. When contacted, Henderson stated that the defendant was not with him at the time defendant claimed and that defendant's scratched face was not from a goose that Henderson and defendant had shot, as defendant

claimed, since defendant already had these scratches on his arrival at Henderson's. Additionally, Henderson stated that he had asked the defendant if he had "got hold of a wild one," and defendant responded that it was a "widow woman or something like that" about in her thirties, who lived the next block over.

The existence of the scratches on defendant's face was corroborated by his work foreman to whom he had said, as he did to the police, that they were from the flailing of a goose.

A staff physician at Pontiac General Hospital determined that the victim needed extensive sutures in her vaginal area, that sperm was present inside her vagina, and that she had a recently ruptured hymen.

Defendant has been represented at the trial and on appeal by able court-appointed counsel.

The issues raised and our resolution of them follow:

1. *May testimony of a prosecution witness be taken where the identity of that witness was discovered solely through an interrogation of the defendant which did not meet the standards of the United States Supreme Court case of Miranda v. Arizona?*

At the time of defendant's interrogation on April 19, 1966, he was advised of his rights as delineated by *Escobedo v. Illinois* (1964), 378 US 478 (84 S Ct 1758, 12 L Ed 2d 977). Defendant did not request the presence of an attorney during his interrogation, and no claim is made that his rights under *Escobedo* were violated.

Almost two months *after* defendant was questioned, the United States Supreme Court decided, on June 13, 1966, in *Miranda v. Arizona* (1966) 384 US 436 (86 S Ct 1602,

16 L Ed 694, 10 ALR3d 974), that any statements of a defendant obtained during custodial interrogation would be excluded from evidence at trials unless certain warnings or information had been given prior to the interrogation, including the information that the defendant was entitled to a court-appointed attorney if he could not afford to hire a lawyer.

One week after *Miranda* was decided, the case of *Johnson v. New Jersey* (1966), 384 US 719 (86 S Ct 1772, 16 L Ed 2d 882), held that *Miranda* would apply only to trials commenced after the decisional date of *Miranda*, June 13, 1966. Since defendant Tucker's trial began on October 18, 1966, the *Miranda* decision applied to his trial and accordingly *the statements that the defendant made during the interrogation were excluded from evidence at his trial.*

We are now presented with the question of whether the exclusionary rule enunciated in *Miranda, supra*, should be extended to include the application of the "fruit of the poisonous tree" doctrine to evidentiary leads obtained from interrogations which were apparently legal at the time of their occurrence, but nevertheless fall into that limbo created by *Johnson, supra*, due to the fact that such interrogations occurred before the decisional date of *Miranda*, but involved cases that went to trial after the decisional date of *Miranda*.

The earliest application of the "fruit of the poisonous tree" doctrine listed in 8 Wigmore, Evidence (McNaughton Revised 1961, § 2184a, p. 40, was in *Silverthorne Lumber Company, Inc. v. United States* (1920), 251 US 385 (40 S Ct 182, 64 L Ed 319). The case concerned an illegal seizure of books, papers, and documents, portions of which federal agents photographed before returning. Justice Holmes, writing for the court, said:

"The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the Government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession but not any advantages that the Government can gain over the object of its pursuit by doing the forbidden act. *Weeks v. United States* (1914), 232 US 383 (34 S Ct 341, 58 L Ed 652, LRA 1915B 834, Ann Cas 1915C, 1117) to be sure, had established that laying the papers directly before the grand jury was unwarranted, but it is taken to mean only that two steps are required instead of one. In our opinion such is not the law. It reduces the Fourth Amendment to a form of words, 232 US 393. The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all."

In another leading case, *Wong Sun v. United States* (1963), 371 US 471 (83 S Ct 407, 9 L Ed 2d 441), the exclusionary rule expressed in *Silverthorne, supra*, was extended to verbal statements as well as to tangible materials, the court finding no logical distinction between the two for the purpose of deterring illegal search and seizure by law enforcement personnel.

The Federal Court of Appeals for the District of Columbia has set forth guidelines applicable to our case in *McLindon v. United States* (1964), 117 App DC283 (329 F2d 238), as follows:

"In each case the court must determine how great a part the particular manifestation of 'individual human

personality' played in the ultimate receipt of the testimony in question. Indications in the record that mere knowledge of the witness's identity would not inevitably guarantee that his testimony would be favorable to the prosecution; that the witness might eventually have voluntarily gone to the police even without their knowing his identity; that his testimony has remained unchanged from the start—all are relevant factors to be considered in determining the final outcome."

The defendant urges us that the rule to be applied in our case is the rule applied in *People v. Peacock* (1968), 29 App Div 2d 762 (287 NYS2d 166, 167, 168):

"Defendant was tried on July 13, 1966, subsequent to the decision in *Miranda* \* \* \* and hence his inculpatory statements, made without the warnings which *Miranda* requires, were inadmissible in evidence. \* \* In point of fact, defendant's statements were not used against him at the trial. He urges, however, that absent his statements the owner of the property (who testified at the trial) would not have been known and the identification of the articles seized could not have been made. In short, he argues that the proof against him at the trial was the tainted fruits (*sic*) of the illegally obtained statements.

"If, indeed, defendant's admissions were the source of the proof against him, we would hold, consistent with the *rationale* in the cases relating to the use of evidence proceeding from an illegal search and seizure, that the fruits of the unlawful conduct in eliciting the admissions without the mandated warnings were equally excluded (citations omitted)."

*Peacock* is not controlling on this Court and we chose not to follow it. We find the dissenting opinion in *Peacock*



more persuasive than the majority one. We quote with approval from that dissenting opinion:

"In any event, we are of the opinion that the 'fruit of the poisonous tree' doctrine should not be strained so as to extend its exclusionary rule to a complaining witness such as the one at bar who, in the ordinary course of events, could be expected to have come forward voluntarily to report the burglary at her home independently of any police investigation allegedly precipitated by defendant's inculpatory illegally obtained admissions and without being prodded into doing so as might conceivably be necessary in the case of a recalcitrant witness who is not a victim of the crime [cf. *Smith v. United States* (1965), 120 App DC 160 (344 F2d 545, 547), *McLindon v. United States* (1964), 117 App DC 283 (329 F2d 238, 241, n. 2); *United States v. Tane* (CA2, 1964), 329 F2d 848, 853]. It is our view that to extend the exclusionary rule to the testimony of such complainant would tend to undermine the doctrine's primary design to protect the innocent and relegate it to the less commendable function of providing technical loopholes for the benefit of the guilty. To subscribe to this would be to discourage and frustrate thorough and expeditious investigations, lest the authorities find themselves the victims of their own efficiency."

Furthermore, in *People v. Dannic* (1968), 30 App Div 2d 679 (292 NYS2d 257), four of the five judges who sat in *Peacock, supra*, said:

✓ "In our opinion, assuming an illegal confession, for the fruit of the poisoned tree doctrine to be operative, a causal chain must be shown to exist from the primary illegality to the procurement of and the effect upon the substance of the evidence sought to be employed. A bare finding that the identity of witnesses was learned by illegal means is

insufficient to warrant exclusion [cf. *Wong Sun v. United States* (1963), 371 US 471 (83 S Ct 407, 9 L Ed 2d 441); *People v. Rodriguez* (1962), 11 NY2d 279 (229 NYS 2d 353, 183 NE2d 651); *Smith v. United States* (1963), 117 App DC 1, (324 F2d 879); *McLindon v. United States* (1964), 117 App DC 283 (329 F2d 238); *United States v. Tane* (CA2, 1964), 329 F2d 848; *Smith v. United States* (1965), 120 App DC 160 (344 F2d 545); *People v. Scharfstein* (1967), 52 Misc 2d 976 (277 NYS2d 516)].

"Before determining the instant motion to suppress, several questions should have been answered: (1) if it be assumed that no statement had been made by defendant to the police, would Cather and O'Connor have come forward voluntarily; (2) if not, would the police have reasonably been expected to learn their identity by an independent investigation; and (3) apart from revealing their identity, to what use, if any, was the illegally obtained information put in procuring the testimony of the witnesses and in affecting the substance thereof."

Defendant's reliance on *Harrison v. United States* (1968), 392 US 219 (88 S Ct 2008, 20 L Ed 2d 1047), is misplaced. The court held that testimony by the defendant at a prior trial was inadmissible upon retrial because it was probably given to overcome the impact of confessions illegally obtained and introduced into evidence, and was tainted by the same illegality that rendered the confessions themselves inadmissible. The Supreme Court specifically reserved decision on the type of case before this Court, saying in footnote 9:

"We have no occasion in this case to canvass the complex and varied problems that arise when the trial testimony of a witness other than the accused is challenged as 'the evidentiary product of the poisoned tree'."

None of the cases reviewed present precisely the same fact situation involved in the case before us.<sup>2</sup> We specifically note that witness Henderson was contacted initially by law enforcement authorities as an alibi witness on behalf of the defendant. Had he supported the defendant's statement that he was scratched by the flailings of a goose, defendant might never have stood trial for the crime of which he has been convicted. Furthermore, could anyone think that the officers had fulfilled their duty towards defendant, had they chosen not to check out his alibi?

One purpose of the rule excluding "fruit of the poisonous tree" is to deter unlawful conduct by police. No such deterrent effect could be obtained by extending the doctrine to the defendant's case wherein the custodial interrogation complied with United States Supreme Court guidelines as expressed up to that time.

Additionally, witness Henderson, not being a participant in the crime, might well have come forward voluntarily with his testimony, and certainly there was no inevitable guarantee that his testimony would be favorable to the prosecution. In fact, as a proffered alibi witness, quite the opposite was to be expected. We have considered the guidelines quoted from *McLindon, supra*, and also those in *Dannic, supra*, and we hold that the testimony of witness Henderson was admissible.

*Jenkins v. Delaware* (1969), 395 US 213 (89 S Ct 1677, 23 L Ed 2d 253), decided after the instant case was ar-

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<sup>2</sup> An exception to the "fruit of the poisonous tree" doctrine has been recognized when knowledge of the tainted information was gained from an independent source, *Silverthorne, supra*, cited in *Wong Sun v United States, supra*. This exception has no application to the facts of the present case.

gued, held that *Miranda, supra*, did not apply to any retrial of a defendant whose first trial commenced prior to June 13, 1966.<sup>3</sup> Our decision not to extend the exclusionary rule stated in *Miranda, supra*, to witness Henderson's testimony is consistent with that case.

2. *Does the stopping of a motor vehicle by a police officer on duty and in uniform to examine the driver's license of the motor vehicle operator constitute an arrest, of that operator?*

The defendant states in his reply brief that "The 'real issue' is to determine under what conditions a police officer may stop (arrest) the defendant to demand the license". There is an assumption in that statement that we are not willing to make, namely, that stopping a driver to examine his driver's license is an arrest.<sup>4</sup> The cases cited by defendant relative to this issue are factually distinguishable, a number of them because they involve a stopping for a traffic violation and a subsequent seizure of evidence.

In the present case, Officer Lindberg did not stop defendant because of any traffic violation, but rather because he was looking for a man named Wayne Thomas Tucker, driving a red 1959 Ford, who was wanted for questioning about a rape. There was no intent to take the defendant into custody until after his driver's license was examined and his name thereby revealed.

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<sup>3</sup> Citing the *Jenkins* decision, the Michigan Supreme Court held in *People v. Woods* (1969), 382 Mich 128, 139 that *Miranda* does not apply to the retrial of a defendant whose first trial commenced prior to June 13, 1966.

<sup>4</sup> MCLA § 257.311 (Stat Ann 1968 Rev § 9.2011) requires the operator of a motor vehicle to have in his immediate possession a license which he shall display upon demand of any uniformed police officer.

We hold that such a stopping did not constitute an arrest.

3. *Does a police officer's telephone call to another police department, answered by some unrecalled person who volunteers that such department seeks in connection with a specific crime, a named, but undescribed suspect; unknown to the officer, driving a vehicle of unknown license, specific make, year and color, constitute probable cause for the officer to arrest a driver of a car so modeled, dated and colored, but not otherwise suspicious, observed five hours later in a different, adjoining and populous municipality at least twelve hours after the alleged crime was committed?*

Our resolution of question 2 makes it unnecessary to rule on this issue.

4. *Is a layman's testimony that a certain dog he observed at one time is the same as a dog observed at a later time a conclusion or opinion which would require, if admissible at all, that the witness first set forth all facts on which he bases such conclusion or opinion?*

Witness White was unequivocal in his identification of the dog in the yard as the same as the dog that was in the victim's house when he arrived. Defendant objected to the admission of this testimony as a conclusion or opinion of the witness not based on supporting facts. However, according to 7 Wigmore, Evidence (3d ed), § 1977:

"The opinion rule has been used as a bludgeon against every conceivable sort of testimony, even against such simple statements as estimates of *distance, time, size, identity*, and the like. Fortunately, however, such attempts have been usually unsuccessful in that class of cases."

In *People v. Quigley* (1921), 217 Mich 213, it was claimed that there was no competent evidence identifying defendants as the persons who committed the robbery. There was testimony that the defendants had the "general appearance" of the persons who committed the robbery. The Court stated, p 222:

"There was other testimony of about the same general tenor. Such testimony was competent, and the weight to be given it was a question for the jury in view of all the other circumstances and the evidence in the case."

A similar result was reached in *People v. Greeson* (1925), 230 Mich 124. We hold that witness White's unequivocal testimony regarding identification of the dog based on original observation was admissible and that the weight to be given it, as affected by the defendant's cross-examination, was a matter for the jury.

5. *Did the witness Patricia Ann Bradley demonstrate sufficient knowledge to be able to testify that the dog referred to in question 4 belonged to the Tuckers?*

Witness Bradley testified that she had lived across the street from defendant for 9 years, had seen defendant about once a week, that the dog belonged to the Tuckers, and that it was inclined to follow members of the Tucker family.

There is no merit in the contention that her testimony was inadmissible.

The citation of cases relative to the admissibility of evidence of dog tracking have no relevance to the facts of this case.

6. *Assuming, arguendo, that the testimony objected to in questions 4 and 5 is otherwise admissible, should such*

*testimony nevertheless have been excluded because it is an impermissible inference to conclude therefrom that the dog followed this defendant-appellant to the victim at the place and time of the offense charged?*

Defendant argued that testimony relative to the dog was inadmissible because an inference cannot be drawn upon an inference.

Such argument fails because only one inference is involved; namely, from the factual testimony that defendant's dog sometimes followed him and was in the victim's house, the jury could infer that it had followed him there.

The testimony by witnesses White and Bradley relative to the dog was admissible for the jury to consider in arriving at a verdict.

7. *Is a microscope slide allegedly showing sperm with testimony by the medical doctor who secured the alleged smear of sperm that such sperm was within the vagina of the alleged victim admissible in a rape case when the doctor further states that he would have no way of knowing whether sperm was on the slide before the test was taken although he testified over objection that the "procedure" was to use fresh slides for each such examination?*

The medical doctor testified that the slide was a "new slide, an unused slide," and "was taken from a container from the manufacturer." This was an adequate foundation for the admission of the slide and the doctor's testimony relative to it. Other considerations brought out by cross-examination went to the credibility of the evidence, not its admissibility.

The "chain of custody" cases cited by defendant are not pertinent to the facts of this case.

8. *Is testimony by the examining physician in a rape case that the victim had a perineal laceration of the female genitalia on the outer surface of the vagina with "penetration" rupturing of the hymenal ring, which he concluded occurred within hours of his examination, indicating "recent trauma," but that he could not conclude what happened to the victim except that she was "assaulted" (and this conclusion was based in part on conversation with unrecalled persons) sufficient to prove corpus delicti without the victim's testimony?*

The *corpus delicti* in forcible rape cases is usually readily established by testimony of the victim. That is not true here, however, as the victim could not remember what happened.

Nevertheless, the testimony of the examining doctor that the victim's hymen had been ruptured within hours of his examination and that there was sperm present within the victim's vagina, coupled with the fact that the victim was discovered tied, gagged, horribly beaten, and incoherent, leaves no doubt that the *corpus delicti* was established.

The defendant has had a fair trial and his conviction is affirmed.

All concurred.





**Supreme Court of the United States**

ROBAK, JR.,

OCTOBER TERM, 1973.

**No. 73-482**

STATE OF MICHIGAN,

*Petitioner,*

vs.

THOMAS W. TUCKER,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SIXTH CIRCUIT.

**BRIEF OF AMERICANS FOR EFFECTIVE LAW EN-  
FORCEMENT, AND THE INTERNATIONAL ASSO-  
CIATION OF CHIEFS OF POLICE, INC., AS  
AMICI CURIAE IN SUPPORT OF THE  
PETITIONER.**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1973.

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**No. 73-482.**

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STATE OF MICHIGAN,

*Petitioner,*

vs.

THOMAS W. TUCKER,

*Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SIXTH CIRCUIT.

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**BRIEF OF AMERICANS FOR EFFECTIVE LAW EN-  
FORCEMENT, INC. AND THE INTERNATIONAL  
ASSOCIATION OF CHIEFS OF POLICE, INC.,  
AS AMICI CURIAE IN SUPPORT OF THE  
PETITIONER.**

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This brief is filed pursuant to Rule 42 of the Supreme Court Rules. Consent to file has been granted by the Office of the Prosecutor of Oakland County Michigan, counsel for the Petitioner, and by Kenneth M. Mogill, Esq., counsel for the Respondent. Letters of consent of both parties have been filed with the Clerk of the Court.

**INTEREST OF THE AMICI CURIAE.**

Americans for Effective Law Enforcement, Inc. (AELE) is a national not-for-profit citizens organization incorporated under

the laws of the State of Illinois. As stated in its by-laws the purposes of AELE are:

1. To explore and consider the needs and requirements for the effective enforcement of the criminal law.
2. To inform the public of these needs and requirements, to the end that the courts will administer justice based upon a due concern for the general welfare and security of law abiding citizens.
3. To assist the police, the prosecution, and the courts in promoting a more effective and fairer administration of the criminal laws.

In furtherance of these objectives AELE seeks to represent in our courts, nationwide, the concern of the average citizen with the problems of crime and of police effectiveness to deal with crime.

The International Association of Chiefs of Police, Inc. (IACP) represents over 5,000 chiefs and top executives of police departments and other law enforcement agencies in all 50 states and in 85 foreign countries. The IACP serves the law enforcement profession and the public interest by advancing the art of police service. Its aims are to foster police cooperation and the exchange of information and experience among police administrators throughout the world, and to encourage adherence of all police officers to high professional standards of performance and conduct. With regard to police professionalism law-related activities, the IACP, in 1970 formed the Police Legal Center of the IACP. This center serves as a hub for legal activities affecting police work, it coordinates the activities of Police Legal Advisors and Police Legal Units, nationwide, and publishes numerous periodicals, documents, and in-service legal training materials for use both by police officers and executives.

The interest of *amici* in the instant case stems from the importance of the issues involved, the resolution of which will have a direct and material impact upon the effectiveness of law

enforcement. The issue in this case to which *amici* address ourselves: "Whether the standards set forth in *Miranda v. Arizona* are too restrictive in excluding admissions and are not mandated by the United States Constitution," is, by definition, one of the most important issues to come before this Court this term, or for that matter, any other term. *Miranda*, at least in the rigid and inflexible application of its dictates which we shall describe, has had a major deleterious effect upon the effectiveness of law enforcement, with a concomitant effect upon the rights of the law-abiding to be reasonably free from criminal harm.

*Miranda* was decided on the narrowest possible basis—five to four. The dictates of *Miranda* have now been the law for almost seven years. This Court has not before agreed to consider the implications of the decision. We believe that this case presents a vehicle for the airing of the effects of this controversial case. *Amici*, in accordance with their stated interests, seek to present our views concerning the effects of *Miranda* to this Court.

#### SUMMARY OF ARGUMENT.

*Amici* agree with and support the legal arguments of the State of Michigan regarding the derivative use of third party testimony obtained from a suspect who had not been properly advised of his rights in accordance with *Miranda v. Arizona*, 384 U. S. 346 (1966); however we will address ourselves to the second question certified: "Whether the standards set forth in *Miranda v. Arizona* are too restrictive in excluding admissions and are not mandated by the United States Constitution?"

*Amici* believe that the victims of crime—individual victims in individual criminal cases and potential victims of criminal violence—are entitled to representation before this Court. Likewise the right and duty of society to protect the law-abiding from the lawless is entitled to such representation.

Mr. Justice White, dissenting in *Miranda* (384 U. S. at 539, 542, and 543) expressed concern over the impact of that case



upon the rights of the victims and the right of society to protect the victims. While we are committed to the principal of fundamental fairness to criminal suspects, *amici* share the concern expressed by Justice White, and we believe that the rigidity and inflexibility of the dictates of *Miranda* have tipped the balance in favor of the criminal suspect and against the law-abiding.

The dictates with regard to the admissibility of statements of the accused which are embodied in the majority opinion in *Miranda* are absolute, rigid and inflexible. They leave no margin for error on the part of law enforcement officers; if the slightest inadvertent *Miranda* "violation" has taken place, the statements of the accused must be suppressed and often the convictions of those whose factual guilt is patent must be reversed and in many cases they must be freed.

As the dissenting justices in *Miranda* pointed out, the language of the majority opinion is couched in such absolute terms that no other factors, such as the obvious voluntariness of a statement or the attempts of law enforcement officers to comply in good faith with *Miranda's* dictates, must be disregarded. This contention is borne out by expert analysis made by a credentialed observer of the *Miranda* majority opinion.

In a broader sense, absolutes such as are found in *Miranda* have no place in such a non-finite area as the law—especially the enforcement of the criminal law. In a discipline as difficult and transitory as the criminal law, in which many learned judges often cannot agree, the rigidity and inflexibility of cases such as *Miranda* can often lead to the most serious miscarriages of justice.

In order to prove this point, *amici* present examples of appellate cases in which the absolute dictates of *Miranda* have required the reversal of the convictions of those whose confessions to crimes—in many cases the most serious sort of crimes—were held to be invalid. These reversals came about, moreover, despite overwhelming evidence that the police were

acting in good faith, the "violations" were highly technical, and the statements made were, by any objective standard, completely voluntary.

The instant case presents a vehicle for the Court to modify the excesses caused by the inflexibility of *Miranda*. *Amici* do not contend that the Court should abandon the concept that a criminal suspect ought to be advised of his right to be free from self-incrimination; rather we urge a modification of the all-or-nothing, no-margin-for-error, rigidity of *Miranda*.

A modification might take the shape of a return to the pre-*Miranda* standard of voluntariness, or it might take the shape of some lesser modification such as reposing some discretion in the trial court to admit a defendant's statements in cases where there was no coercive police conduct and the statements were made voluntarily, or where any of the *Miranda* violations were inadvertent, or where a serious miscarriage of justice would result if the statements were not admitted.

In this context, *amici* urge that the Court modify *Miranda's* inflexibility with regard to both confessions and admissions.

The facts of the instant case present a proper vehicle for this Court to modify *Miranda*, as it is clear that there were no coercive police practices involved, the defendant's statements were made voluntarily, the *Miranda* "violation" was completely inadvertent, and a miscarriage of justice would surely take place if the instant defendant's rape conviction should be reversed.

A modification of *Miranda's* absolute commandments would do no injury to the concept of *fundamental fairness* to criminal suspects. Egregious police conduct and coerced confessions, the basic truthfulness of which is in doubt, would still be inadmissible, as they were before *Miranda*, and, indeed, they should be. *Amici* urge only a balance between the rights of the accused and the rights of the law-abiding in our society.

*Amici* anticipate a counter-argument that any modification of *Miranda* would be used by the police to oppress minorities

and the poor and powerless. Our response is two-fold. First, if a police officer uses coercive tactics to extort a confession from a member of a minority race, that confession would be inadmissible under any modification of *Miranda* which we believe this Court might make. Second, and perhaps more importantly, it is precisely the minorities and the poor and powerless who bear the greatest burden of violent crime. If fewer criminals were freed, to return to the ghetto to victimize again, the great majority of ghetto dwellers who are decent, law-abiding citizens living in constant fear of crime, would deservedly benefit.

For these reasons *amici* urge this Court to utilize the instant case as a vehicle to modify the rigid and inflexible mandate of *Miranda* with regard to the admissibility of confessions and admissions.

#### ARGUMENT.

*Amici* will not reiterate the legal arguments made by the State of Michigan in this case with regard to the derivative use of third party witness testimony obtained from a suspect who had not been advised in accordance with the requirements of *Miranda v. Arizona*, 384 U. S. 346 (1966). We do, however, agree with, and support, such arguments and wish to associate ourselves with them. In this context we urge the Court to resolve the conflict of the lower courts on this issue in favor of the reasoned and common sense position taken by the United States Court of Appeals for the District of Columbia Circuit in *Smith v. United States*, 324 F. 2d 879 (1963) and *Brown v. United States*, 375 F. 2d 310 (1967), and by the Supreme Court of the State of Michigan in unanimously affirming the conviction in the instant case. 385 Mich. 594, 189 N. W. 2d 290 (1971).

*Amici* will address ourselves to the second question certified: "Whether the standards set forth in *Miranda v. Arizona* are too restrictive in excluding admissions and are not mandated by the

United States Constitution?" (Petition for Writ of Certiorari of the State of Michigan, page 3). We will present to the court evidence that the inflexible and rigid standards for the admissibility of confessions and admissions found in the absolute language of the *Miranda* majority opinion are having a significant deleterious impact upon the enforcement of the criminal law and we ask this court to review these standards in the context of the instant case.

### **I. The Victims of Crime Are Entitled to Representation Before This Court.**

Mr. Justice White, in his dissenting opinion in *Miranda v. Arizona*, 384 U. S. 346 (1966), with the concurrence of Mr. Justice Stewart and the late Mr. Justice John M. Harlan, assessed the impact of that decision upon the enforcement of the criminal law and upon the victims of crime. Speaking of the majority decision he stated:

There is, in my view, every reason to believe that a good many criminal defendants who otherwise would have been convicted on what this Court has previously thought to be the most satisfactory kind of evidence will now, under this new version of the Fifth Amendment, either not be tried at all or will be acquitted if the State's evidence, minus the confession, is put to the test of litigation.

I have no desire whatsoever to share the responsibility for any such impact on the present criminal process.

In some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him. As a consequence, there will not be a gain but a loss in human dignity. (384 U. S. 542)

He then spoke, with extreme irony:

There is, of course, a saving factor: *the next victims are uncertain, unknown, and unrepresented.* 384 U. S. 543 (emphasis added)

Mr. Justice Clark also dissented from the majority opinion.

*Amici* seek to represent the "uncertain, unknown, and unrepresented" victims of crime for whom Justice White and his fellow dissenters expressed concern. Our concern, however, goes beyond the representation of a particular individual who happens to become the victim of a crime. We seek, in a broader sense, to represent the vindication of the rights of *all* of the actual and potential victims of crime and of the *right*, and the *duty*, of society to provide for the security of all of the law-abiding citizens of this country.

This right and duty was explicitly expressed by Justice White, again in his dissenting opinion in *Miranda*:

The most basic function of any government is to provide for the security of the individual and his property. . . . These ends of society are served by the criminal laws which for the most part are aimed at the prevention of crime. Without the reasonably effective performance of the task of preventing private violence and retaliation it is idle to talk about human dignity and civilized values. (384 U. S. 539)

We seek to represent these interests of society, as well as the rights and, indeed the *civil liberties* of those who have suffered, or who will suffer, as a result of the reversal of convictions or the outright freeing of patently dangerous criminals via the rigid and inflexible application of the absolute standards for the admissibility of admissions and confessions mandated by the majority of the Court in the *Miranda* decision.

*Amici* state emphatically that we do *not* seek to represent the rights of the victims of crime to the total exclusion of the rights of criminal suspects. We merely urge that a *balance* be established between these conflicting interests—a balance which does not presently exist due to the rigid application of the *Miranda* rule.

The Fifth Amendment rights of all persons to be free from the use against them of coerced or illegally compelled state-

ments is a precious right and one that must be fully safeguarded. *Amici* in this case do not for a moment condone any police practices, past or present, which are likely to induce anyone to confess to a crime which he did not commit. In *Miranda*, however, the majority of the Court, in its zeal to protect suspected or accused criminals from the consequences of almost any statement that they might make, has tipped the balance too far in favor of the criminal suspect, to the extreme and unwarranted detriment of the victims of crime. When this happens, society as a whole must be the loser.

Our position has been succinctly stated by Dr. Sidney Hook, the distinguished professor of philosophy, formerly of New York University, now at Stanford University:

The potential victim has at least just as much a human right not to be violently molested, interfered with and outraged as the person accused of such crimes has to a fair trial and a skillful defense. As a citizen, most of the rights guaranteed me under the Bill of Rights become nugatory if I am hopelessly crippled by violence and all of them become extinguished if I am killed.<sup>1</sup>

## **II. The *Miranda* Decision Mandates Too Rigid and Too Inflexible a Set of Absolute Standards for the Admissibility of Statements of the Accused, Which Standards Do Not Take Into Consideration the Necessity for Interrogation in Criminal Investigations.**

The dissenting opinions in *Miranda* dealt at length with the lack of any constitutional basis for the majority position and with the lack of wisdom of the policy considerations embodied in that position. We see no need, therefore, to repeat these arguments at any length, although *amici* certainly subscribe to them. We confine ourselves to pointing out just *how* inflexible these standards are.

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1. "The Rights of the Victim: A Reflection on Crime and Compassion," *Encounter*, March, 1972.

Former Chief Justice Warren summarized the majority holding, stating:

... we hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege, and unless other fully effective means are adopted to notify the person of his right of silence and to assure the exercise of the right will be scrupulously honored the following measures are *required*. He *must* be warned prior to any questioning that he has a right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights *must* be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, *no evidence obtained as a result of interrogation can be used against him*. 384 U. S. 479 (emphasis added)

This is about as categorical a mandate as will be found in any court decision any time, anywhere. The warnings must be given, the waiver *must* be secured and proven, and, if there is a failure in any manner to do this, *no evidence* obtained as a result of the interrogation may be used.

As Mr. Justice Clark, dissenting in *Miranda*, pointed out, any failure to follow the Court's mandate "... *requires inexorably* the exclusion of any statements by the accused as well as the fruits thereof." 384 U. S. 500. (emphasis added)

The majority rule in *Miranda* is an absolute, inflexible command, phrased in the broadest possible terms, which brooks no abridgment. There is not the slightest recognition in the majority opinion that policemen and prosecutors are human beings and, as such, are prone to error. There simply *is* no margin for error in the majority rule; and, if, perchance, error is

committed during the turmoil and complexity of a criminal investigation the statements of the accused—whether inculpatory or exculpatory—must be suppressed, the fruits of such statements must be excluded, convictions must be reversed, in consequence of which confessed criminals, whose factual guilt is patent, must often be freed.

This is so, moreover, no matter how slight the deviation from the rigid *Miranda* standards, no matter what evidence there might be of the good faith attempts of the police or prosecution to comply with the *Miranda* dictates, and no matter what evidence there might be that, by any other objective standard, the statements of the accused were made voluntarily. *Miranda*, quite simply, serves to suppress the truth; it dictates an all-or-nothing situation with the criminal offender standing to benefit greatly from the slightest inadvertent deviation by law enforcement officers seeking to establish the truth in a criminal investigation.

Mr. Fred P. Graham, then the highly capable and respected Supreme Court reporter for the *New York Times* and an attorney himself, wrote, in 1970, a book entitled, "The Self-Inflicted Wound,"<sup>2</sup> in which he described, from his particular vantage point, the decisions made during the decade of the 1960s in the area of the criminal law by the Supreme Court of the United States under the Chief Justiceship of Earl Warren. Although liberally oriented and basically sympathetic with the "Warren Court's" criminal law decisions with regard to the rights of suspects, Mr. Graham had this to say with regard to the attitude of the majority of the Court with regard to the *Miranda* decision:

This was the core of the Supreme Court's difficulties over *Miranda*—in order to abolish the abuses that cropped up in some but by no means all police investigations, it would have to condemn the "voluntariness" approach which the Court itself had always approved before and which the police saw as a reasonable way to do their job. If the Court were to frame a prophylactic procedure rigid enough

2. Graham, "The Self-Inflicted Wound," The McMillan Company, 1970.



to rule out all of the abuses that the voluntariness approach could permit, *it would also outlaw many instances of reasonable, noncoercive police inquiry about crime.* (Emphasis added)<sup>3</sup>

Also, where the previous landmark decisions had imposed rigid but narrow restrictions on state officials' conduct, *Miranda* was to lay down a statute-like code of procedure consisting of four commandments, some of which included sub-commandments.<sup>4</sup>

Despite the Court's zig zag course, its trend was clear; it would continue to cast about for an objective standard by which police questioning could be regulated *and if the standard proved so rigid that the police could not interrogate effectively at all, that would be a tolerable outcome in [the majority of] the Warren Court's eyes.* (Emphasis added)<sup>5</sup>

*Amici* agree with this appraisal of the *Miranda* majority made by an objective and experienced observer, concerning the absolute nature of the *Miranda* decision.

The inflexibility of the outlook of the *Miranda* majority is also demonstrated by its attitude towards the potential availability of other evidence of guilt, besides the statements of the accused in criminal cases. Chief Justice Warren, writing for the majority stated:

... Our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors rather than by the cruel, simple expedient of compelling it from his own mouth. 384 U. S. 460

This statement appears to recognize only two means of police investigation: 1) independent investigation and 2) compelling evidence from the mouth of the accused. It simply ignores both the fact that in many criminal investigations there may be little or no other evidence than the statements of the ac-

3. *Ibid.*, page 156.

4. *Ibid.*, page 158.

5. *Ibid.*, page 159.

cused, and the fact that, in the majority of cases, the process of interrogation by a competent criminal investigator, in the normal course of his investigation, is neither "cruel" nor "compelling." The latter is a third means of police interrogation in which compulsion of evidence from the accused is not inherent; it is, rather, a search for the truth by questioning a suspect about himself, his actions, and his explanations for them.

As the late Justice Hugo Black, one of the five majority justices in the *Miranda* case, stated in a Fourth Amendment context, which we believe applies equally to the indispensability of the interrogation procedure:

It is always easy to hint at mysterious means available just around the corner to catch outlaws.<sup>6</sup>

Likewise, in *Criminal Interrogations and Confessions*, the authors, who disavow the use of any tactics or techniques which might induce confessions from the innocent, describe various situations in which statements of the accused may be the principal or, in some cases, the only means of proving the guilt of the perpetrator of a crime:

... A man is hit on the head while walking home late at night. He does not see his assailant nor does anyone else. A careful and thorough search of the crime scene reveals no physical clues. Then take the case of a woman who is grabbed on the street at night and dragged into an alley and raped. Here, too, the assailant was unaccommodating enough to avoid leaving his hat or other means of identification at the crime scene, and there are no other physical clues. All the police have to go on is the description of the assailant himself. She describes him as about six feet tall, white, and wearing a dark suit. Or consider this case, an actual one, in Illinois. Three women are vacationing in a wooded resort area. Their bodies are found dead, the result of physical violence, alongside a foot trail, and no physical clues are present.<sup>7</sup>

6. *Berger v. New York*, 384 U. S. 41, at 73 (1967) dissenting opinion).

7. Inbau and Reid, "Criminal Interrogations and Confessions," Williams and Wilkins Co., Baltimore, Md. (1967), page 214.

Cases such as these show the absolute necessity of police interrogation of criminal suspects; yet this necessity was largely ignored, or at best paid lip service to, by the majority of the Court in *Miranda*.

In addition, we suggest the broader point that, in a discipline such as the law, and particularly the highly complex area of the law pertaining to criminal investigations, there is simply no place for categorical absolutes such as those embodied in the *Miranda* opinion.

In the finite sciences such as physics or mathematics we must perforce deal with absolutes. A falling body, for example, accelerates its fall at 32 feet per second, per second, no more and no less. The field of law, however, is by no means such an exact science. This is clearly illustrated by the fact that, in many, if not most, appellate opinions, learned judges cannot agree about the law. An outstanding example is the *Miranda* case itself; it was a five to four decision.

Chief Justice Burger has pointed up the fallacy of a resort to absolutes in the area of the enforcement of the criminal law. In his dissenting opinion in *Bivens v. Six Unknown Named Narcotic Agents*,<sup>8</sup> he criticized the absolute, across-the-board application of the Exclusionary Rule to all Fourth Amendment violations:

Although unfortunately ineffective, the exclusionary rule has increasingly been characterized by a single, monolithic and drastic judicial response to all official violations of legal norms. Inadvertent errors of judgment that do not work any injustice will inevitably occur under the pressures of police work. These honest mistakes have been treated in the same way as deliberate and flagrant *Irvine* type violations of the Fourth Amendment. For example in *Miller v. United States*, . . . reliable evidence was suppressed because of a police officer's failure to say a "few more words" during the arrest and search of a known narcotics peddler. 403 U. S. at 418.

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8. 403 U. S. 388 (1971).

We submit that the same "single, monolithic and drastic" response is to be found in the absolute approach taken by the *Miranda* majority towards confessions—an approach which has no place in an area as difficult as the utilization of interrogation procedures by criminal investigators in the determination of deception or truthfulness on the part of persons suspected of having committed criminal offenses.

**III. The Rigidity and Inflexibility of the Absolute Application of the Miranda Rule Has, in Many Cases, Resulted in the Victimization of Individuals, and of Society, by Requiring the Reversal of Convictions of Criminals Despite the Fact that the Miranda "Violations" Were at Most Technical and the Confessions Were by Any Objective Standard Voluntary.**

Justice White, in his dissenting opinion in *Miranda*, predicted that a good many criminals would, under the *Miranda* mandate, " . . . either not be tried at all or acquitted if the State's evidence, minus the confession is put to the test of litigation." 384 U. S. 542

The necessary flexibility which would have helped to alleviate the consequences which Justice White predicted was not permitted by the majority in *Miranda*. We here illustrate the result of this inflexibility through examples of cases, selected from a much greater number of cases, in which Justice White's prediction of miscarriages of justice has been substantiated. They are actual appellate cases, and they present a clear picture of the effects of *Miranda*.<sup>9</sup>

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9. We are mindful, of course, that there have been some attempts at empirical studies of the effects of *Miranda* upon law enforcement made by spokesmen for both sides of the question. We believe that, in this instance, the use of actual cases presents a clearer picture than do the studies. Our reasons for this are two-fold. First, we believe that the studies to date, both pro and con, have serious weaknesses: the bias of those conducting the studies; the relatively small and scattered samples involved; and the presence of extrinsic factors which are simply not capable of measurement,

Again, we wish to emphasize that we believe that fundamental fairness—to society as well as to the accused—requires that a confession, to be admissible, must be voluntary. We submit, however, that the absolute and total inflexibility of the *Miranda* rule often requires the reversal of convictions and the freeing of criminal suspects in cases in which there was no lack whatsoever of such fundamental fairness and it is *only* the rigidity of the *Miranda* rule, as interpreted by appellate and trial courts, which requires reversal.

The interrogation process from start to finish is extremely complex. It is a process in which there is so much room for error, yet one for which the application of the rigid rule of *Miranda* leaves no margin for error at all. Mr. James B. Zagel, Assistant Attorney General of the State of Illinois, in a comprehensive analysis of *Miranda* and its progeny has categorized some of the major “issues in *Miranda*” in the following manner:

Is the situation custodial?

Is It Interrogation?

Is It Interrogation by Law Enforcement Officers?

Is There Adequate Warning?

Does The Particular Suspect Require Warnings?

Were The Rights Fully Waived?

e.g. if a suspect refuses to make a statement after being given the *Miranda* warnings, we really cannot know whether he would have refused to make a statement even without the warnings or whether the warnings, in effect, “talked him out” of making a statement.”

Our second reason for utilizing an actual case method to present our position is more basic. We believe that *any* case in which a confession, which is by every objective standard voluntary, must be suppressed and a conviction reversed because law enforcement officials ran afoul, in some slight manner, of the rigid standards of *Miranda*, is, in fact, a miscarriage of justice. Moreover, when such cases are multiplied by a factor of hundreds, there has occurred a significant breakdown in the criminal justice system.

Several of these studies and their results are summarized in Graham, “The Self-Inflicted Wound” (*supra*, pages 11, 12) at pages 279-282.

## Under What Conditions May a Suspect be Interviewed More Than Once?

### Does It Apply To Misdemeanors and Other Proceedings?<sup>10</sup>

This is a formidable array of legal and/or factual situations in which the police officer or prosecutor must act, and, in addition, act in the sure and certain knowledge that because of the inflexibility of *Miranda*, any error may be irredeemably fatal to his case. Against this background we turn to specific cases.<sup>11</sup>

In each of these cases, the court excluded a confession or reversed a conviction based on its interpretation of *Miranda*. If we make the reasonable assumption that the courts did not want to reverse the convictions of confessed murderers, rapists and other assorted criminals, then the conclusion is inescapable that the courts felt themselves bound to do so by the absolute language in the *Miranda* opinion.

There are additional factors common to each of the cases presented:

1. There is absolutely no showing of flagrant, wilful or coercive misconduct by the law enforcement officers involved.
2. There is evidence of good faith attempts by the officers to comply with both the letter and spirit of *Miranda*.
3. The *Miranda* violation is at most a highly technical one.
4. By any objective standard the confessions were voluntary, i.e. they would have passed muster with this

10. Zagel, "Confessions and Interrogations after *Miranda*" published by the National District Attorneys Association, January 1972.

11. Although they were not selected because of the seriousness of the crimes, most of the cases do involve serious crimes such as murder, rape or robbery. The actual crime involved, however, is not the central issue, for the fact must be borne in mind that *Miranda* applies, across the board, at least to all felonies, so that an appellate case which requires the reversal of, say, a relatively minor forgery conviction may also require the reversal of several rape or murder convictions of other offenders because of the application of the holding in the less serious forgery case.

Court's pre-*Miranda* holdings dealing with "voluntariness" and the "totality of the circumstances" as the standards by which confessions were measured.<sup>12</sup>

Case No. 1. *Commonwealth v. Singleton*, 266 A. 2d 753, 439 Pa. 185, Supreme Court of Pennsylvania. (1970)

Defendant confessed to and was convicted of murder in the beating death of his mother, sister and grandmother. The court noted that the Commonwealth's case consisted primarily of defendant's incriminating statements; however his statements were nullified and his conviction was reversed. The defendant had been given the proper *Miranda* warnings in every respect except that he was advised that anything that he said could be used "for or against" him. The court held that the use of the single word "for" vitiated the entire confession under the *Miranda* holding.

Case No. 2. *Commonwealth v. Davis*, 270 A. 2d 199, 440 Pa. 123, Supreme Court of Pennsylvania. (1970)

Again the court reversed a first degree conviction for robbery—murder because the word "for" was included in otherwise satisfactory warnings.

Case No. 3. *Biggerstaff v. State*, Okl. Cr., 491 P. 2d 345, Court of Criminal Appeals of Oklahoma. (1971)

The defendant—convicted of first degree murder—had been given *Miranda* warnings which were satisfactory in all respects except that he was advised that he was entitled to an attorney "at any time." The court found this warning to be insufficient

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12. *Coulumbe v. Connecticut*, 367 U. S. 586 (1951); *Rogers v. Richmond*, 365 U. S. 534 (1961); *Fikes v. Alabama*, 352 U. S. 191 (1957). The "totality of circumstances" test was even applied in one of this Court's post-*Miranda* decisions in a case involving a pre-*Miranda* confession. In *Frazier v. Cupp*, 394 U. S. 731 (1969), the validity of a confession was sustained even though the police interrogator falsely told the defendant that his accomplice had confessed, and even though the defendant had said: "I had better get a lawyer before I talk any more." Mr. Justice Marshall, writing for the Court viewed this statement as a "passing comment" rather than as a request for a lawyer.

advice to the suspect that he had a right to the presence of an attorney during questioning. It cited a similar holding by the United States Court of Appeals for the Fifth Circuit in *Atwell v. United States*, 398 F. 2d 507 (1968). The Court in *Atwell* rejected the use of the words "at any time," stating: "'Anytime' could be interpreted by the accused in an atmosphere of pressure from the glare of the law enforcer and his authority, to refer to an impending trial or event other than the moment the advice was given and the interrogation following." 398 F. 2d at 510. (Emphasis added)

The court in *Biggerstaff* also noted that, absent the defendant's confession, which had been ruled inadmissible, the evidence was not sufficient to sustain a conviction for the crime of murder.

*Comment:* In the foregoing cases the courts apparently felt compelled by the rigidity of the language in the *Miranda* decision to engage in extremes of semantic gymnastics in order to hold the confessions of three convicted murderers inadmissible despite the fact that the intention on the part of the police to comply with *Miranda* is clearly apparent. The courts in these cases completely disregarded any objective standard which would demonstrate that the confessions were voluntarily made and they delved into the murky area of what the suspects *might* have understood from otherwise sufficient warnings.

Case No. 4. *Franklin v. State*, 252 A. 2d 487, 6 Md. App. 572, Court of Special Appeals of Maryland (1969).

Defendant was convicted of several armed robberies. He was given full and proper *Miranda* warnings on September 4th, 1967 at which time he made incriminating statements about certain of the armed robberies. On September 6th, 1967 he was interrogated about the armed robbery involved in his appeal. Upon this latter occasion he made statements which were used to impeach him when he testified at trial.<sup>13</sup> Defendant

13. This case was decided prior to this Court's decision in *Harris v. New York*, 401 U. S. 222 (1971) in which the use of such statements for impeachment purposes was held to be proper.



was not readvised of his rights under *Miranda* at the September 6th interrogation. The court held that the September 6th statements were inadmissible because of the two day hiatus since the original warnings had been given. The court gave no reason for this decision except to state that the two day delay "would fall short of compliance with the dictates of the *Miranda* decision." 252 A. 2d 487 at 491.

Case No. 5. *People v. Milton*, 75 Cal Rptr. 803, Court of Appeal of California (1969).

Defendant, when arrested for the murder of his wife was given the proper *Miranda* advisements by the arresting officer, at which time he stated that he did not wish to make a statement. Some two hours later a detective, who was apparently unaware of the previous warning and refusal to make a statement, again properly advised the defendant of his rights, whereupon the defendant made admissions which were inconsistent with his later trial testimony. The appellate court held that the admissions should have been excluded. Defendant's murder conviction was thus reversed, *despite the fact that the second interrogator was unaware of the first refusal and that the admissions made at the second interrogation were apparently voluntary.*

Case No. 6. *Scott v. State*, 475 S. W. 2d 699, Supreme Court of Arkansas (1972).

In reversing the defendant's conviction for the rape of a two-year-old girl, the court noted in this case that there were no eyewitnesses to this crime as the victim was too young and the only other witness, her father, had been killed in an automobile accident. Defendant was properly advised and refused to make a statement. Then, according to the Court: "About three months later a deputy sheriff who was passing the cell where Scott was confined asked him, in the course of what appears to have been a bantering conversation, if he had raped the little girl. Scott replied, 'yeah'." 475 S. W. 2d

This statement was held invalid as not being voluntarily made under *Miranda* and the rape conviction was reversed.

*Comment:* The preceding cases are examples of lower courts engaging in some fairly energetic "second-guessing" of law enforcement officers, because of the compulsion of the inflexible dictates of *Miranda*. Although in each case there is no evidence of coercive questioning and the statements were made voluntarily, the courts saw fit to reverse the convictions on very close issues such as the timing of the questions asked, the fact of a prior refusal to talk even though this may well have been unknown to the second questioner, or as in the *Scott* case, where there was no real attempt at interrogation at all. In each case it clearly appears that *only* the inflexibility of *Miranda* dictated the reversal.

Case No. 7. *United States v. Millen*, 338 F. Supp. 747, United States District Court for the Eastern District of Wisconsin (1972).

Defendant was a practicing attorney who caused a package of hashish to be mailed to himself at the office of the law firm for which he worked. Federal agents observed him receive the package and later arrested him. Defendant, after being given the *Miranda* warnings by a federal agent, made inculpatory statements and told the agent where the package was located in his office. Despite the fact that defendant was a practicing attorney, his conviction was reversed because the Court found that he had not sufficiently waived his rights under *Miranda*, and the Court suppressed physical evidence in the case, in part because it was located through defendant's statements.

Case No. 8. *Commonwealth v. Goldsmith*, 363 A. 2d 322, 438 Pa. 83, Supreme Court of Pennsylvania (1970).

Defendant, wanted for murder and manslaughter, surrendered to the police accompanied by his attorney. The attorney left and defendant was interrogated by the police, at which time he made incriminating statements. Prior to his interrogation he was asked seven questions concerning whether or not he understood his rights, to which he replied: "I will give you

an oral statement. My lawyer said I could make one without giving you the motive of what happened." The court held that his was an invalid *Miranda* waiver and it rejected the inference that defendant had knowledge of his rights from the fact that he came to the station with his attorney.

Case No. 9. *DuPont v. United States*, 259 A. 2d 355, District of Columbia Court of Appeals (1969).

A Washington, D. C. police officer received information that defendant had a machine gun concealed in his bed in a girl's apartment. After receiving from the girl a valid consent to search her apartment, the officer seized the machine gun from the defendant's bed. Defendant was arrested. At the police station the arresting officer called defendant's attention to a large sign on the wall containing the *Miranda* warnings. Defendant refused to look at it. Later a Sergeant Eyanoff interrogated defendant. He attempted to give defendant the *Miranda* warnings, but defendant cut him off stating, "I know my rights, man," and, according to the court, defendant indicated: "... that Sgt. Eyanoff didn't have to go into that." Again defendant did not look at the card on the wall.

Thereafter, defendant made inculpatory statements exonerating the girl in whose apartment the gun was found, called his attorney, and then made further inculpatory statements. The court suppressed all of the defendant's statements as violative of *Miranda*.

Chief Judge Hood, dissenting, stated that under these facts:

I think *Miranda* must be interpreted in a realistic and reasonable manner, and that the officers did all that reasonable men could do.

What more could the officers have done? Should they have forced appellant to read or listen? Should the detectives have continued to read when it was obvious that appellant was not listening?

It is my opinion that when officers make a good faith effort to inform an arrested person of his *Miranda* rights and that person refuses to pay any attention to the officers,

such person has no standing to claim that he was not informed of his rights. 259 A. 2d. 359 and 360.

*Comment:* In the three preceeding cases the investigating officers had given, or attempted to give *Miranda* warnings, and they had every reason to believe that the defendant was well aware of his rights, yet in each case the rigidity of the *Miranda* rule compelled the courts to suppress the statements made. The fact that any commonsense analysis would dictate that one who is a practicing attorney, one who states he knows his rights, or one who arrives at the police station with an attorney would be aware of his rights and that the statements were voluntary was disregarded by the courts and the inflexible *Miranda* standards were applied.

\* \* \* \* \*

These cases are not isolated instances. They were culled from well over 150 appellate cases, decided during the years 1968—1973 in which law enforcement officers ran afoul of the inflexible standards dictated by *Miranda*, even though there was a good faith attempt to comply with *Miranda* and no coercive tactics had been used.<sup>14</sup> And these are only appellate cases. There is simply no way, at least in the time allowed for the filing of this brief, to determine how many cases have been dismissed at the trial level, or simply have not been brought to trial, because of asserted *Miranda* violations. We believe that, at a conservative estimate, such cases, nationwide, would number in the hundreds, perhaps the thousands.

It is true, of course, that in many cases in which a confession is suppressed and a conviction reversed, there may be enough "untainted" evidence to secure a conviction at a new trial, but in many instances this is not so, and, without the use of the defendant's statements, he may have to be freed or the charges against him dismissed.

Whether or not a given defendant is re-convicted or freed is

14. Research Source: Nedrud, *The Criminal Law*, 1968-1973, LE Publications, Chicago, Illinois.

not the central part of our argument. The rigid dictates of *Miranda* apply to *all* cases (at least all felony cases) involving confessions, and whether or not there is sufficient evidence, absent a confession, to convict will be a completely fortuitous event in any particular case, depending upon the nature of the crime, the care with which the criminal goes about covering his tracks, and the luck or diligence involved in the police investigation. As we pointed out in Section II of this argument, there are some crimes in which a confession or admission by the guilty party will be the *only* evidence available to the prosecution.

It is, beyond any question, a travesty of justice when a murderer, rapist, robber, or other criminal must be foisted onto society because his otherwise voluntary confession fell, in some slight measure, short of the *Miranda* requirements, and no other evidence exists to convict him. This travesty affects many innocent, law-abiding persons. The criminal's original victims, or, in some cases the families of his victims, surely suffer at seeing the one who has victimized them go unpunished. Should the beneficiary of *Miranda's* commandments commit other crimes, additional victims surely suffer at his hands.<sup>15</sup> Society itself suffers, in addition, because it has failed to vindicate the rights of the lawabiding against the lawless and violent.

Our argument, however, goes deeper than the question of whether, in a given case, a confessed criminal must be freed or whether there is sufficient "untainted" evidence for a re-trial.

15. Cases such as this do happen. For example, in Baltimore George McChan, who was serving a 40 year term for robbery was freed because his confession was insufficient under *Miranda*. Four days after his release he was re-arrested and convicted for the robbery-murder of a restaurant proprietor. (Source: The Baltimore City Police Department and a letter dated March 7, 1967 from then States Attorney Charles E. Moylan Jr. of Baltimore City, Maryland to Senator John L. McClellan, describing the effect of the *Miranda* decision in Baltimore.) In Jacksonville, Florida, a confessed murderer who had been released because his confession was invalidated, was subsequently arrested on two counts of armed robbery and two counts of assault to murder. He pled guilty to one robbery charge and received a life sentence. (Source: Jacksonville, Florida Police Department Attorney Mr. Richard Gentry.)

We believe that the rigid and inflexible standards for the admissibility of confessions and admissions which are dictated by the absolute language in *Miranda* have no place in an area as complex as the enforcement of the criminal law. We submit that fairness to the actual and potential victims of crime in our society requires that this court re-examine the rigidity and inflexibility of the *Miranda* ruling with a view towards restoring a balance between the interests of criminal suspects on the one hand and the law-abiding citizens on the other.

**IV. The Instant Case Provides a Vehicle for This Court to Review and Modify the Rigid and Inflexible Requirements of the *Miranda* Decision With Regard to Confessions as Well as Admissions. We Urge This Court To Do So.**

As we pointed out in the brief prefatory remarks to our argument section, *amici* address themselves to the second question certified by this Court in the instant case: "Whether the standards set forth in *Miranda v. Arizona* are too restrictive in excluding admissions and are not mandated by the United States Constitution?"

We note that the actual question presented to this Court deals only with admissions; however, our argument in this section will deal with the broader question of both admissions and confessions for the following reasons:

1. The majority in *Miranda* certainly made no distinction between admissions and confessions.
2. The petitioner has argued the issue of confessions as well as admissions in its brief.
3. In its Petition for Certiorari, at page 11, the State of Michigan presented this Court with arguments dealing with confessions as well as admissions: "While in total agreement that such important [Fifth Amendment] constitutional rights must be carefully protected, Petitioner urges that confessions may be intelligently and voluntarily made, *in some instances*, even absent the *Miranda* warnings." (emphasis in the original).

4. Our argument is not concerned with the nature of the statements made, i.e., confessions *vis-a-vis* admissions, but rather with the absolute flexibility of the dictates of *Miranda* as applied to *any* statement made by a criminal accused.
5. In the instant case the admissions made by the defendant—the name of an individual to whom the defendant had made incriminating statements and who the defendant apparently hoped would support a totally spurious alibi, could hardly be more damaging than a confession.

In this argument we are not urging the Court to abandon totally the concept of advisement to a suspect of his right to be free from self-incrimination. We do, however, urge some modification of the all-or-nothing, no margin-for-error, inflexibility of *Miranda* which we have described in the preceeding section.

We respectfully urge the Court to utilize the instant case as a vehicle to make such a modification as it sees fit: perhaps a return to the pre-*Miranda* voluntariness standards for determining the admissibility of confessions in the "totality of the circumstances," with the presence or absence of warnings to be considered along with other interrogation circumstances in the determination of a confession's voluntariness or trustworthiness; perhaps some lesser modification such as reposing some limited discretion in trial courts to admit or use the accused's statements, even though *Miranda* has been "violated," if:

1. No coercive tactics or egregious police conduct was involved; and,
2. The "violation" was inadvertent or can otherwise be satisfactorily explained; or
3. The statments appear to have been made voluntarily, *except for the Miranda* violation; and
4. A miscarraige of justice—i.e., the freeing, or the reversal of the conviction of a serious criminal offender whose factual guilt is patent.

The instant case presents just such a situation.<sup>16</sup> The respondent was convicted of a horribly brutal rape and assault. So brutal, in fact, was the beating administered to the victim that she has never been able to recall what happened to her or to identify her assailant. Defendant's dog was found in the victim's house, which led to his becoming a suspect. When he was interrogated, pre-*Miranda*, the interrogating officer complied with all of the law then in effect in the State of Michigan, but he omitted the admonition, which *Miranda* was soon to require, that the suspect could have court-appointed counsel. Defendant gave the police the name of one Henderson apparently in the hopes that Henderson would support defendant's completely false alibi about being with him (Henderson) at the time of the crime and that the scratches on defendant's face were caused by a goose. Henderson, unfortunately for the defendant, refused to confirm this alibi and gave extremely damaging testimony against defendant at his trial. Concededly the prosecution learned of Henderson from defendant's statement and the prosecution would not have obtained Henderson's testimony except for the defendant's statements.

Defendant's statements were made pre-*Miranda* but his trial was post-*Miranda* and so, under the ruling of *Johnson v. New Jersey*, 384 U. S. 719 (1966), *Miranda* applied to his statements in its full rigidity. Defendant's statements were held inadmissible as violative of *Miranda* but the testimony of Henderson was admitted and this admission was sustained on appeal by the Michigan Court of Appeals and the Michigan Supreme Court.

The United States District Court for the Eastern District of Michigan, however, reversed defendant's conviction upon his *habeas corpus* petition, holding that Henderson's testimony was the "poisoned fruit" of the *Miranda* violation and that it should have been held inadmissible. The United States Court of Ap-

16. This analysis is based upon information from the Petition for Certiorari of the State of Michigan and from the lower court opinions in this case.



peals for the Sixth Circuit affirmed this decision. In effect, the two federal courts applied *Miranda* in its most rigid and inflexible aspect. Although admitting that there was no applicable precedent from this Court on the precise issue, the United States District Court held *Miranda* fully applicable to the testimony of Henderson, a holding which, as we have stated, was subsequently affirmed by the Sixth Circuit.

When this situation is placed in the context of the modification of the inflexibility of the *Miranda* rule, which we urge, the following conclusions can be reached: that the defendant's admissions and the fruit thereof—Henderson's testimony—were barred despite the fact that:

1. There is no evidence of egregious police conduct or coercive tactics.

2. The *Miranda* "violation" was clearly inadvertent, as *Miranda* had not even been decided when the interrogation took place and the officers complied with the then existing law regarding the advisement of rights to criminal suspect.

3. Defendant's statements were clearly voluntary; he had been advised of his rights to silence and to the presence of an attorney and he gave an affirmative, although spurious, alibi which he obviously hoped Henderson would confirm.

4. If defendant's conviction is reversed and he must be retried without Henderson's testimony, a miscarriage of justice will obviously take place, for, without that testimony, it is highly likely that defendant will be freed. As the Supreme Court of the State of Michigan, prior to being reversed on *habeas corpus* by the Federal courts, in affirming defendant's conviction, phrased the issue: "In the absence of reversible error—of which there simply is none—the assailant should not be granted a new trial which, in these days of more and more shackling of law enforcement, usually means an order for outright release upon society of one whose record justified the latest sentence imposed."<sup>17</sup>

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17. 385 Mich. 594 at 595.

We submit that the rigidity of *Miranda* should be modified in this case, and future cases of a like nature, to the extent that not only the statements of the third party witness should be admissible but also that the statements of the defendant, in the factual context of this case, should be admissible.

A modification of *Miranda*, either through a return to a voluntariness standard or through the discretion in trial courts to admit admissions and confessions in some instances, would not, in our opinion, do injury to the concept of *fundamental fairness* to criminal suspects which we firmly support. We believe that, as the dissenting Justices in *Miranda* forcefully pointed out, the inflexibility of that case—again, as opposed to *fundamental fairness*—is not mandated by the Constitution of the United States.

The suggested modification of *Miranda* would in no way condone egregious or coercive police conduct. Even prior to *Miranda* such conduct was not condoned by this Court, nor should it have been. But the inflexible rule in *Miranda* bars even those statements which are not the product of such conduct but rather of those “. . . inadvertent errors of judgment that do not work any injustice [which] will inevitably occur under the pressures of police work.”<sup>18</sup> When an officer tells a suspect in the course of otherwise perfect *Miranda* warnings that his statement can be used “for or against” him, or when an officer tells the suspect that he may have a lawyer “at any time,” this is the farthest thing in the world from coercive conduct; yet in each of these instances lower courts, bound by the inflexible dictates of *Miranda*, excluded otherwise voluntary statements and reversed murder convictions because of such inadvertent errors. A modification of *Miranda* would prevent such miscarriages without doing harm to *fundamental fairness* at all.

We believe that the rigid standards embodied in the absolute language of the *Miranda* majority have resulted in no substantial

18. Burger, C. J., dissenting in *Bivens v. Six Unknown Named Narcotics Agents*, 403 U. S. 388 at 418, *supra*, page 14.

additional protection of the rights of the accused. Rather, it has resulted in the exclusion of voluntary statements on hyper-technical grounds which have no relation to the fundamental fairness of police activities with regard to the accused.

Nor is the modification of *Miranda* suggested herein any radical notion. This is borne out by the fact that Title II of the Omnibus Crime Control and Safe Streets Act of 1968,<sup>19</sup> which purports to return the voluntariness standards for the admissions into evidence of statements by suspects in Federal criminal cases, passed the United States Senate by a vote of 72 to 4 and the House of Representatives by a vote of 368 to 17. *Amici* do not take a position herein on the *constitutionality* of such legislation; we merely point out that overwhelming majorities of this nation's legislators are in agreement with our basic premise that something should be done about the rigidity of the *Miranda* rule.

Finally, we anticipate that our call for a modification of *Miranda* will be countered by opposing counsel and *amici* as being a new means for law enforcement officers to oppress minorities and the poor and the powerless. Our answer to this anticipated argument is two-fold. First, nothing that we suggest should produce such a result. If a police officer drags in a suspect of any minority race and beats or coerces a confession out of him, then that officer is engaging in precisely that sort of egregious misconduct which we deplore, and which would vitiate any confession or statement made by anyone, either under pre-*Miranda* "voluntariness" standard or under the modification of *Miranda's* inflexibility which we suggest.

More importantly, however, it is patent in that in many cases the police have an absolute need to use admissions and confessions to solve crimes and *far and away the greatest majority of the victims of crime, particularly violent crimes, are the ghetto dwellers, the minorities and the poor and the powerless.* The late Herbert L. Packer, Stanford University Criminologist,

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19. 18 U. S. C. 3501.

found in a study, released in 1970, that ghetto dwellers are at least 100 times as likely to be victims of street crimes as are middle class whites living in the suburbs.<sup>20</sup> According to Professor Packer, one out of seventy ghetto inhabitants fell victim to a mugger, rapist or assailant in 1969, while in the overall population the incidence of these crimes was one in 10,000. Those who should be the major source of concern in the criminal justice system—the victims of crime who happen to be of a minority race—will, in fact benefit if the criminal who preys upon them ceases to be freed, because the rigidity of *Miranda*, returns him “. . . to the street and to the environment which produced him, to repeat his crime whenever it pleases him.”<sup>21</sup>

The contention that a relaxation of restraints on police conduct, such as a modification of *Miranda* would entail, will *a fortiori* be used to repress minorities was refuted by Mr. James R. Thompson, then a Professor of Law at Northwestern University and now the United States Attorney for the Northern District of Illinois, in an *amicus curiae* brief presented to this Court by Americans for Effective Law Enforcement, Inc., one of the *amici* herein, in the case *Terry v. Ohio*, 392 U. S. 1 (1968):

The police could, of course, withdraw from the ghetto . . . This alternative might be somewhat tolerable if only criminals lived in the ghetto; at least their interferences with human liberty in the form of murder, rape, robbery and other crimes would be practiced on each other. But others live in the ghetto as well—innocent, law-abiding American citizens by far the overwhelming majority. They are entitled under the Constitution to live their lives and experience the safety of their homes and their streets without fear of criminal marauders. They have suffered enough—discrimination, poverty, lack of education. Must they also be deprived of the protection of the law as well.<sup>22</sup>

20. Crime Control Digest, March 25, 1970, page 7. See also: “Black Crime Preys on Black Victims” Associated Press, Report in the Denver Post, August 23, 1970.

21. White, J., dissenting in *Miranda v. Arizona*, 384 U. S. at 542, *supra*, page 7.

22. Brief *Amicus Curiae* of Americans for Effective Law Enforcement, Inc., in *Terry v. Ohio*, pages 28 and 29.

In closing our argument we cite to this Court the words of the distinguished Judge Henry Friendly of the United States Court of Appeals for the Second Circuit, speaking in 1968 about the Fifth Amendment privilege against self-incrimination:

At the end of the 1960s it is necessary to vindicate the rights of society against what in my view has become a kind of obsession with the privilege, which has stretched it far beyond not only its language and history but any justification in policy.<sup>23</sup>

*Amici* concur, and we urge this Court to modify the inflexibility of *Miranda* in order to restore a balance to this area of the criminal justice system.

### CONCLUSION.

The *Miranda* decision mandates a rigid and inflexible set of standards for the determination of the admissibility of confessions and admissions in criminal cases. This inflexibility has resulted in miscarriages of justice in many cases because confessions and admissions have been suppressed, convictions have been reversed, and often criminals whose factual guilt was patent were freed—this despite the fact that no coercive tactics were used by the police, the “violations” of *Miranda* were at most technical, and the statements suppressed were, by any objective standard voluntary.

*Amici* do not believe that there is a place in an area as difficult and demanding as the enforcement of the criminal law for absolutes such as are mandated by the majority opinion in *Miranda*. We do not advocate an abandonment of a suspect's rights to be free from self-incrimination. Rather, we urge the Court to utilize the instant case as a vehicle to modify the

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23. Friendly, *The Fifth Amendment Tomorrow: The Case For Constitutional Change*. The Robert S. Marx Lectures for 1968 at the University of Cincinnati College of Law, November 6, 7, 8, 1968.

extreme rigidity of *Miranda* so that a balance may be established between the rights of the criminal accused and the rights of the law-abiding citizen.

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IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1973

No. 73-482

STATE OF MICHIGAN,

*Petitioner,*

v.

THOMAS W. TUCKER,

*Respondent.*

On Writ of Certiorari to the United States  
Court of Appeals for the Sixth Circuit

BRIEF OF THE STATE OF CALIFORNIA  
AMICUS CURIAE IN SUPPORT OF PETITIONER

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IN THE  
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM 1973

No. 73-482

STATE OF MICHIGAN,

*Petitioner,*

v.

THOMAS W. TUCKER,

*Respondent.*

On Writ of Certiorari to the United States  
Court of Appeals for the Sixth Circuit

**BRIEF OF THE STATE OF CALIFORNIA  
AMICUS CURIAE IN SUPPORT OF PETITIONER**

**INTEREST OF AMICUS CURIAE**

The State of California has a special interest in the present case. Any extension of categories of issues cognizable by way of federal habeas corpus (28 U.S.C. § 2241) presents problems of vital concern to each state. The primary responsibility for the enforcement of the criminal justice process in this country resides in the states. The erosion of finality of state court criminal convictions through the use of federal collateral

remedies has both subverted the original purpose of the federal writ of habeas corpus as well as minimized society's interest in the finality of criminal judgments.

If, as contended by petitioner and fully supported by the State of California, the standards of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.2d 974 (1966), are too restrictive in excluding admissions and are not mandated by the United States Constitution then federal collateral attacks on such final state court judgments should not be permitted.

Where, as in this case, the substantive merits of the issues raised have been fully and fairly litigated in the state courts, the undue extension of *Miranda* requirements by the federal courts is an unwarranted use of the writ of habeas corpus. The *Miranda* issue does not bear upon the integrity of the fact-finding process. To require police officers to comply with the specifics of an opinion (*Miranda*) at a time prior to the opinion's issuance and when compliance with the then existing law was had (*Escobedo v. Illinois*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964)), merely exacerbates the problem of federal-state relationships. It seeks to impose upon the states through the use of a collateral remedy a stricter standard for the admission of statements than Congress has now established for confessions under the federal justice system (Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 3501(b)).

The State of California joins the State of Michigan in urging that this Court reconsider the effective date of *Miranda*, limit any expansion of its doctrines and further hold that the doctrine is not constitutionally compelled so as to permit recourse to federal habeas corpus for collateral attacks on final state court judgments on such grounds.

### ARGUMENT

#### I. The Miranda Doctrines Should Not Be Extended to Encompass Voluntary Statements Meeting Legal Requirements at the Time of the Occurrence.

A. The Dicta of *Johnson v. New Jersey*, 384 U.S. 719 (1966), Should Not Require the Application of *Miranda v. Arizona*, 384 U.S. 436 (1966), to this case.

In *Johnson v. New Jersey*, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966), decided one week after the *Miranda* decision, *supra*, this Court held that *Miranda* should not be applied retroactively. In the *Johnson* case, however, the questioning and the trial occurred several years prior to *Miranda*. Most of the states and lower federal courts have purported to follow the dicta of *Johnson* and applied *Miranda* to situations occurring prior to *Miranda* but where the trial date was subsequent to *Miranda*.<sup>1</sup> Such a result ignores the criteria previously used by this Court in determining the retroactivity issue: (a) the purpose to be served

<sup>1</sup> Pre-*Miranda* confession—post-*Miranda* trial—*Miranda* requirements applied: *United States v. Vanterpool*, 394 F.2d 697, 699-700 (2d Cir. 1968); *United States v. Fox*, 403 F.2d 97, 100 (2d Cir. 1968); *United States v. Chaplin*, 435 F.2d 320, 322 (2d Cir. 1970); *Griffith v. Jones*, 283 F.Supp. 794 (N.D. Ga. 1967); *Evans v. United States*, 375 F.2d 355 (9th Cir. 1967); *Groshart v. United States*, 392 F.2d 172, 175 (9th Cir.

by the new standards; (b) the extent of the reliance by law enforcement authorities on the old standards; and (c) the effect on the administration of justice of a retroactive application of the new standards. First among these factors is the purpose to be served by the new constitutional rule (See *Williams v. United States*, 401 U.S. 646, 91 S.Ct. 1148, 28 L.Ed.2d 388 (1971), holding *Chimel v. California*, 395 U.S. 752 (1969), applicable to searches conducted after the date of *Chimel*; *Desist v. United States*, 394 U.S. 244, 253 (1969), holding *Katz v. United States*, 389 U.S. 347 (1967), applicable to wiretaps occurring after *Katz*; *Stovall v. Denno*, 388 U.S. 293, 300-301 (1967) holding *United States v. Wade*, 388 U.S. 218 (1967) and *Gilbert v. California*, 388 U.S. 263 (1967), applicable to cases where the confrontations occurred after the decisions in these cases). To the same effect was *Morrissey v. Brewer*, 408 U.S. 471, 490, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) and *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656, 666 (1973), where the court limited the new requirements as to due process in parole procedures to situations arising after the dates of those decisions.

The application of an occurrence-date of prospectivity in the case at bar would eliminate the necessity

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1968); *People v. Welborn*, 2 Cal.App.3d 715, 82 Cal.Rptr. 845 (1969); *Young v. State*, 234 So.2d 341 (Fla. 1970); *State v. Anderson*, 229 So.2d 329 (La. 1969); *Commonwealth v. Bujnowski*, 267 N.E.2d 924 (Mass. App. 1971); *People v. Kilduff*, 276 N.Y.S.2d 814, 816 (1966); *Commonwealth v. Yount*, 435 Pa. 276, 279 (1969); *People v. Schader*, 71 Cal.2d 761, 80 Cal.Rptr. 1, 457 P.2d 841 (1969); *People v. Rollins*, 65 Cal.2d 681, 56 Cal.Rptr. 295, 423 P.2d 221 (1967).

of police officers having the necessary prescience to anticipate opinions of this Court. It would minimize the strain on federal-state relations now occasioned by the overruling of state court decisions by federal courts for failure of the police to apply later developed standards when at the time of the occurrence they had acted in good faith on the law then in effect. The adoption of such a rule of prospectivity would not undermine the purposes of *Escobedo* and *Miranda*. Those decisions were directed at future police practices and any past misconduct could not be cured by setting free prisoners who have committed heinous crimes but who fortuitously would become entitled to their release not on the ground of innocence but because the police could not foresee later developed technical requirements.<sup>1a</sup>

Here at the time of the taking of the statements, the law enforcement officials relied upon the *Escobedo* requirements and advised respondent of his right to counsel and to the privilege against self-incrimination. His basic constitutional rights were protected. It does not appear that the fact that he was not advised of his rights as to court appointed counsel if he were indigent would make his statements in any manner involuntary. It is apparent that if the occurrence had taken place subsequent to *Miranda* the officers would have known and therefore complied with its requirements. To apply *Miranda* requirements to a case

<sup>1a</sup> *United States v. Calandra*, 42 U.S.L.W. 4104 (1974).



where the officers could not have known of its requirements when they sought to ascertain the respondent's connection with the offense and where they merely learned the name of the person he considered his "alibi" witness can hardly be considered as compelling him contrary to his volition to convict himself.

The retroactive application of *Miranda* requirements to the factual situation here presented would in fact glorify form over substance and obviously disrupt the administration of criminal justice. Such an extended application of the *Miranda* rule which does not deal with the integrity of the truth determining process tends to create disrespect for the law by the police, lawyers,<sup>2</sup> lawmakers,<sup>3</sup> and all involved in the criminal justice process.

Amicus curiae therefore urges that this Court limit the applicability of *Miranda* requirements to occurrences subsequent to the date of that decision in accordance with the rationale of the decision itself and the reasons for not applying it to retrials found in *Jenkins v. Delaware*, 395 U.S. 213, n. 7, 89 S.Ct. 1677, 23 L.Ed.2d 253 (1969).

B. The Application by the Federal Courts of a Stricter Standard for Admissibility of Statements of a Respondent Than Congress Has Required for the Admissibility of Confessions in Federal Courts Is Not Mandated by the Federal Constitution.

In *Miranda v. Arizona*, 384 U.S. 436 (1966), this Court held that no confession, admission or exculpa-

<sup>2</sup> Schaefer, *The Control of "Sunbursts": Techniques of Prospective Overruling*, 42 N.Y.U.L. Rev. 631, 645 (1967).

Schwartz, *Retroactivity, Reliability and Due Process*, 33 U. Chi.L. Rev. 719, 764 (1966).

<sup>3</sup> Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 3501; P.L. 90-351, Title II, 82 Stats. 210.

tory statement could be introduced into evidence at any trial unless certain detailed warnings were given and waivers obtained in accordance with the opinion's requirements.

Subsequently thereto Congress enacted the Omnibus Crime Control and Safe Streets Act, effective June 19, 1968. In section 3501 of Title 18: (P.L. 90-351, Title II, 82 Stats. 210), it is provided:

#### **"ADMISSIBILITY OF CONFESSIONS**

"(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

"(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such

defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

“The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.”

“ . . . . .  
“(e) As used in this section, the term ‘confession’ means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing.”

Admittedly, this legislation by its very terms applies only to federal prosecutions. Nevertheless, it recognizes that *Miranda* in terms of the specific requirements therein set forth is not constitutionally compelled. (See 1968 U.S. Code Cong. and Ad. News, pp. 2112, 2123-2138).

In *Miranda*, itself, this Court stated (384 U.S. at 467):

“ . . . [W]e cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted.”

In the instant case it is apparent that the statement in which the lead was given to the witness whose tes-

timony was sought to be suppressed met the requirements of what Congress felt to be the governing factors of a voluntary statement. Here, the respondent was advised of his rights to counsel as well as his privilege against self-incrimination. Save and apart from failure to advise him as to the appointment of counsel if he were indigent his statements would clearly have been voluntary in the traditional sense.

The *Miranda* ruling has led to a multitude of cases presenting questions of law not related to true voluntariness of a confession or admission by reason of hypertechnical questions of interpretation. As is readily apparent courts have been loath to turn loose upon society those individuals who were accorded full due process rights save for the fortuitous circumstances that their cases were tried subsequent to *Miranda* and all specifics were not found in the records.

Where Congress has recognized society's interest in the ascertainment of the truth and has balanced society's interests against that of the individual it is apparent that any expansion of *Miranda* is not alone unwarranted but contrary to Congressional intent, particularly where it is applied to a final state court judgment subjected to a collateral attack in federal courts.

**II. Federal Habeas Corpus Should Not Be Permitted to Review Final State Court Criminal Convictions Based on Alleged Violations of *Miranda v. Arizona*, 384 U.S. 436, *Supra*, or *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).**

In the recent case of *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973), this Court upheld a consent search against a collateral attack in the federal courts and found that the consent was voluntary and the standard used by the state court in reaching this determination, the totality of circumstances, was proper. One of the questions also raised in the case was the use of federal habeas corpus to review final state court judgments on questions involving search and seizure. Mr. Justice Powell in a concurring opinion joined in by the Chief Justice and Mr. Justice Rehnquist discussed and rejected the use of federal habeas corpus to review Fourth Amendment claims. Mr. Justice Powell concluded with language which is directly apposite to the present case (412 U.S. 218 at 275):

“ . . . Indeed, it is difficult to explain why a system of criminal justice deserves respect which allows repetitive reviews of convictions long since held to have been final at the end of the normal process of trial and appeal where the basis for re-examination is not even that the convicted defendant was innocent. There has been a halo about the ‘Great Writ’ that no one would wish to dim. Yet one must wonder whether the stretching of its use far beyond any justifiable purpose will not in the

end weaken rather than strengthen the writ's vitality."

The same reasoning is applicable to review of *Miranda* contentions which do not have as their primary purpose the protection of either the reliability of the fact-finding process at the trial or on appeal from the judgment of conviction.

Although *Miranda* guards against the possibility of unreliable statements in every instance of in-custody interrogation it encompasses situations in which the danger is not necessarily as great as when the accused is subjected to overt and obvious coercion. (*Johnson v. New Jersey*, 384 U.S. 719, 729-730, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966).) Patently the situation presented in the case at bar where merely the name of a witness was obtained from the statement of the respondent at a time when the police conduct would not have been illegal, the application of the *Miranda* and *Wong Sun* doctrines to such procedure is an undue expansion of the two doctrines.

To avoid the result reached by the district and circuit courts in this case other state and federal courts have used several methods. Some courts have distinguished between the discovery of evidentiary material and the discovery of the identity of witnesses;<sup>4</sup> other

<sup>4</sup> Witnesses Testimony Not Suppressed: *State v. Johnson*, 192 N.W. 2d 87 (Minn. 1971); *Smith v. United States*, 324 F.2d 879, 882 (D.C. Cir. 1963), cert. den. 377 U.S. 954; *Brown v. United States*, 375 F.2d 310 (D.C. Cir. 1967); *Pfeifer v. State*, 460 P.2d 125 (Okla. Cr. 1969). Contrary: *Williams v. United States*, 382 F.2d 48 (5th Cir. 1967); *United States v. Tane*, 329 F.2d 848, 853 (2d Cir. 1964); *Goodman v. United States*, 285 F.Supp. 245 (C.D. Cal. 1968); *Commonwealth v. Cephas*, 17 Pa. 500, 291 A.2d 106 (1972).

courts by somewhat strained construction have found that the results would have been reached otherwise, i.e., by the voluntary action of the witness whose identity was disclosed;<sup>5</sup> still other courts have held that in the normal course of police investigation the identity of the witness would have been discovered;<sup>6</sup> and still other courts have found an attenuation of the taint by time, warnings, change of position of the witness or some other reason such as the defendant not being in custody at the time of the interrogation so as to require *Miranda* warnings.<sup>7</sup> Obviously the courts have balanced the need for the protection of society with the need to deter illegal police activity and where the balance is on the side of society have found reasons for refusing to apply the *Miranda* and *Wong Sun* doctrines.

<sup>5</sup> *United States v. Hoffman*, 385 F.2d 501, 504 (7th Cir. 1967); *United States v. Evans*, 454 F.2d 813, 818 (8th Cir. 1972).

<sup>6</sup> *United States v. Holsey*, 437 F.2d 250, 253 (10th Cir. 1970); *United States v. Marder*, 474 F.2d 1192 (5th Cir. 1973); *People v. Fitzpatrick*, 32 N.Y.2d 499, 300 N.E.2d 139 (1973); *Lockridge v. Superior Court*, 3 Cal.3d 166, 89 Cal.Rptr. 731, 474 P.2d 683 (1970); R. Maguire, *How to Unpoison The Fruit, The Fourth Amendment And The Exclusionary Rule* (1964) 55 J. Crim. L. C & P.S. 307, 314-317.

<sup>7</sup> *Johnson v. State*, 496 S.W.2d 72 (1973); *People v. Pettis*, 298 N.E.2d 372, 12 Ill.App.3d 123 (1973); *United States v. Workman*, 470 F.2d 151 (4th Cir. 1972); *People v. Carter*, 204 N.W.2d 703, 43 Mich. App. 735 (1972); *United States v. Brandon*, 467 F.2d 1008 (9th Cir. 1972); *United States v. Tyler*, 459 F.2d 647 (10th Cir. 1972); *United States v. Evans*, 454 F.2d 813 (8th Cir. 1972); *People v. Gill*, 187 N.W.2d 707 (Mich. 1971); *State v. Miranda*, 104 Ariz. 174, 450 P.2d 364 (1969); *People v. McInnis*, 6 Cal.3d 821, 100 Cal.Rptr. 618, 494 P.2d 690 (1972); *People v. Welborn*, 2 Cal.App.3d 715, 82 Cal.Reptr. 845 (1969).

Where, as in this case, the federal courts have expanded these doctrines to encompass situations occurring prior to the decision in *Miranda* certainly the rationale for the rule—the deterrence of improper police practices—is not served. There is a scarcity of judicial resources. A repetition of hearings in federal courts in instances where a respondent has had a full and fair state hearing is a useless expenditure of judicial time, personnel, prosecutors and defense counsel. The encouraging of collateral attack frustrates the deterrent effect of the law and the effectiveness of rehabilitation. There is an undue subordination of state courts to lower federal courts with the resulting exacerbation of federal-state relationships and the doctrine of federalism is itself eroded. The guilt or innocence of the defendant or respondent is not in doubt. The situation presented is a question of compliance with technicalities upon which various courts have disagreed and the requiring of prescience on the part of law enforcement of requirements which will later be imposed under a future opinion.

These objections to the use of federal habeas corpus have been recognized by Judge Friendly in his article, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142 (1970); Professor Bator in his article on *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harvard Law Review 441; Professor Doub in his article, *The Case Against Modern Federal Habeas*



*Corpus*, 57 A.B.A.J. 323, and in a recent article, Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 Harvard Law Review 321 (1973). The conclusions of these commentators and judges supports the contentions of the amicus curiae herein. Since the exclusionary rules are not designed to insure the fairness of the trial but to discipline police officers, the impact of the rule on such discipline when utilized as the basis for collateral attack on a final judgment is certainly minimal. (Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi.L.Rev. 665 (1970).)

As Mr. Justice Powell further stated in his concurring opinion in *Schneckloth v. Bustamonte*, 412 U.S. 218, 251:

“ . . . Neither the history or purpose of habeas corpus, the desired prophylactic utility of the exclusionary rule as applied to Fourth Amendment claims, nor any sound reason relevant to the administration of criminal justice in our federal system justifies such a power.”

Amicus curiae submits that the action of the lower federal courts in the instant case erroneously expanded the application of the *Miranda* doctrine and arrived at a conclusion not compelled by the United States Constitution.<sup>8</sup> The further expansion of the use of federal habeas corpus with its concomitant burdens on

<sup>8</sup> Amicus curiae also joins with petitioner in Argument II of Brief of Petitioner.

the system of criminal justice should not be permitted particularly in a case such as the present one in which the respective respondent has received that "due process" to which he was entitled under the federal Constitution.

### CONCLUSION

For the foregoing reasons, the State of California as amicus curiae on behalf of the petitioner herein, respectfully requests this Court to reverse the decision of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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1-9-74

SA 74 U.S. 01

UNITED STATES CODE  
28 U.S.C. § 2241

§ 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

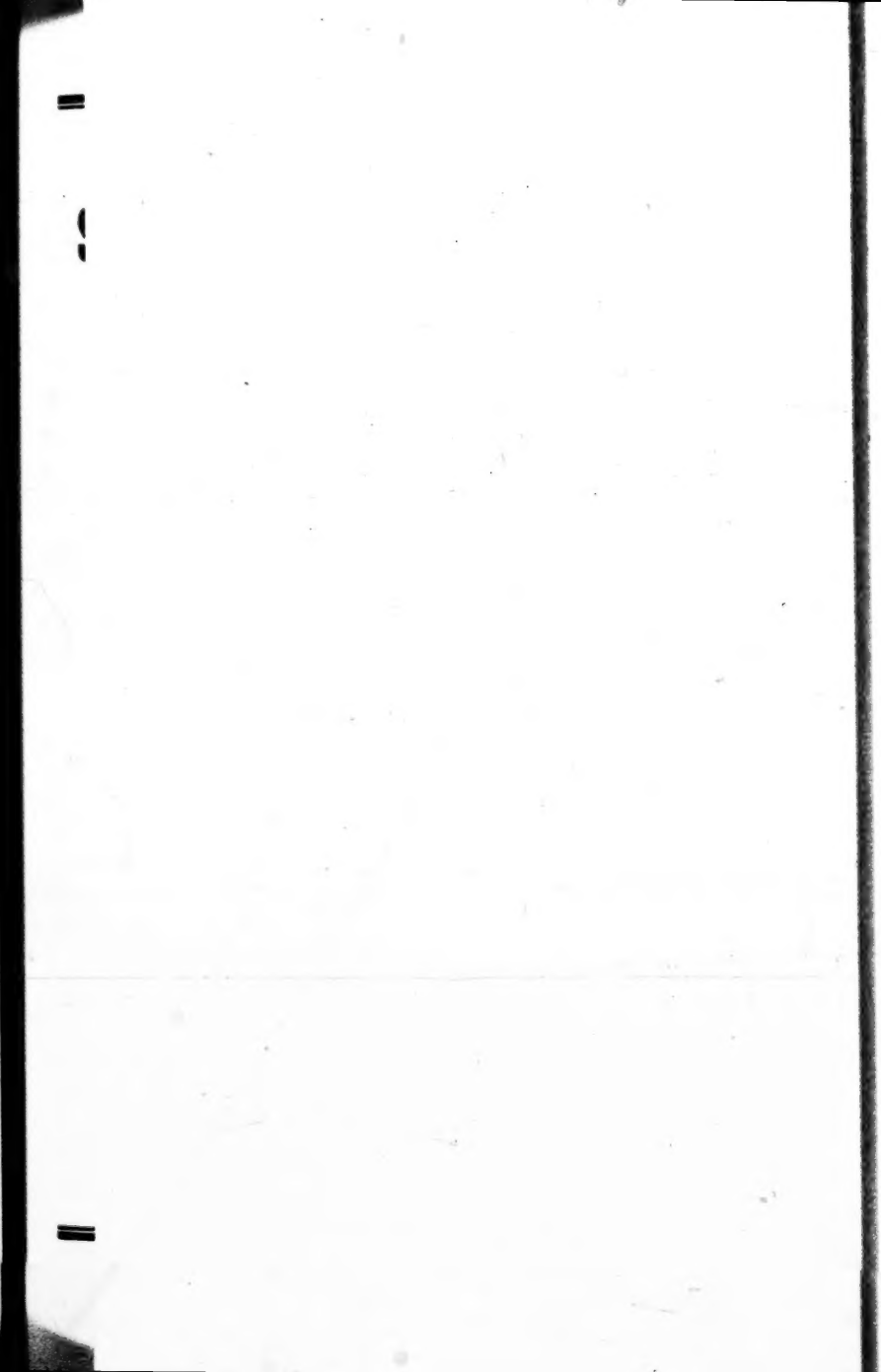
(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination. As amended May 24, 1949, c. 139, § 112, 63 Stat. 105; Sept. 19, 1966, Pub.L. 89-590, 80 Stat. 811.



JAN 17 1974

MICHAEL ROBB, JR., CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1973

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No. 73-482

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STATE OF MICHIGAN,

vs

THOMAS W. TUCKER,  
Respondent.

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SIXTH CIRCUIT

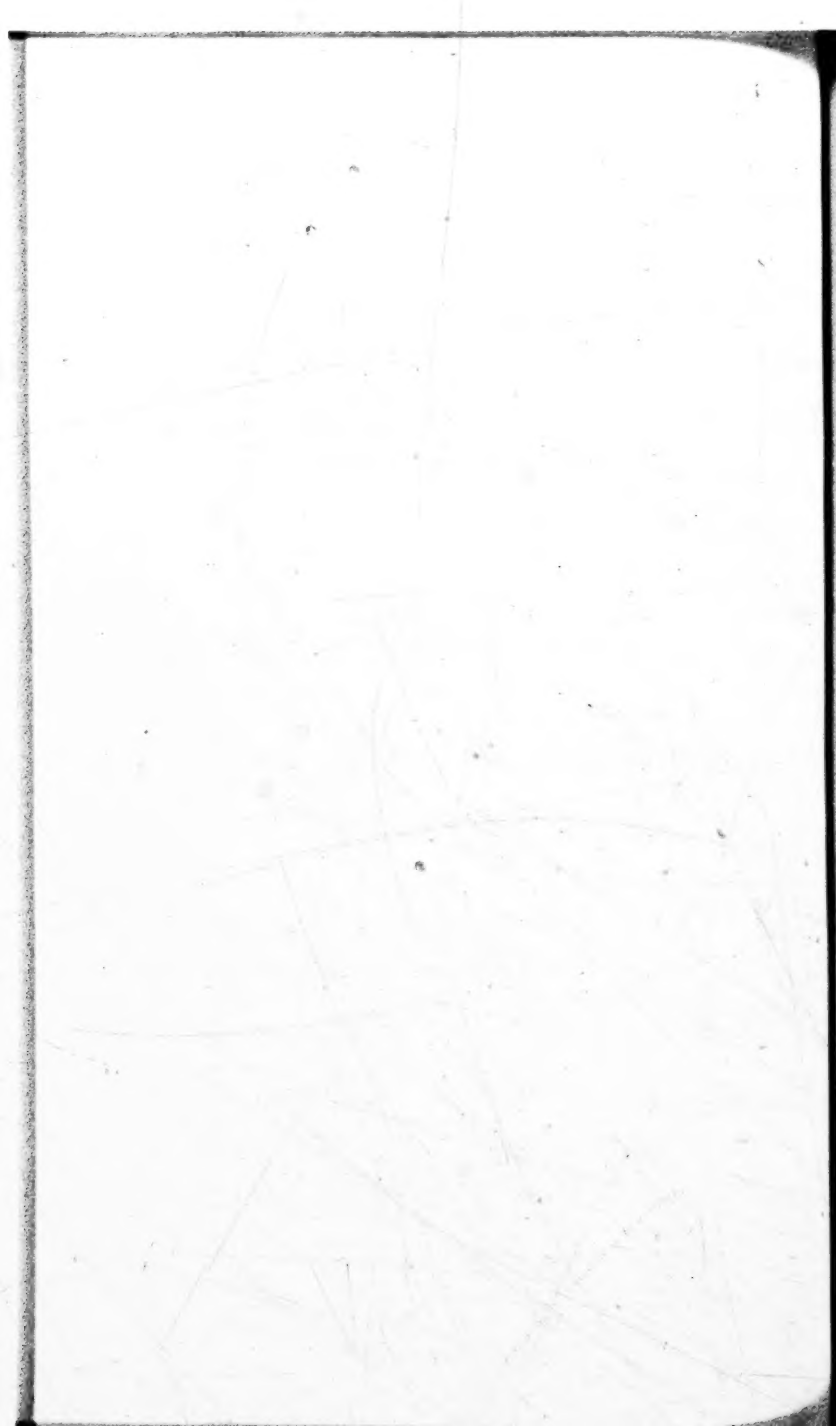
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**BRIEF FOR THE PETITIONER**

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**BRIEF FOR THE PETITIONER**

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**OPINIONS BELOW**

The order of the United States Court of Appeals for the Sixth Circuit affirming the decision of the United States District Court was filed on June 21, 1973, and is not reported. The decision of the United States District Court, Eastern District of Michigan, Southern Division, was filed on December 22, 1972, and is reported at 352 F Supp 266 (ED Mich, 1972). The opinion of the Supreme Court of the State of Michigan was filed on August 27, 1971, and

is reported at 385 Mich 594; 189 NW 2d 290 (1971). The opinion of the Michigan Court of Appeals was filed on October 1, 1969, and is reported at 19 Mich App 320, 172 NW 2d 712 (1969). Copies of all four opinions of the lower courts are included in the printed Appendix to the Petition For A Writ Of Certiorari filed in this cause with this Court on September 14, 1973.

## JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit was filed on June 21, 1973. The petition for a writ of certiorari was timely filed on September 14, 1973, and was granted on December 3, 1973. The jurisdiction of this Court rests on 28 USC, Section 1254(1).

## QUESTIONS PRESENTED

### I.

Whether the testimony of a witness is inadmissible under the "Poisonous Fruits" doctrine when that witness' identity was discovered through a proper pre-*Miranda* interrogation of the defendant which did not meet the standards subsequently set forth in *Miranda v Arizona*, 384 US 436 (1966)?

### II.

Whether the standards set forth in *Miranda v Arizona*, 384 US 436 (1966) are too restrictive in their exclusion of confessions and are not mandated by the United States Constitution?

## CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved in this cause are as follows:

Constitution of the United States, Amendment V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Constitution of the United States, (Amendment XIV, Section 1:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## STATEMENT OF FACTS

On April 19, 1966, Miss Marion Corey was found tied, gagged and partially disrobed in her Pontiac Township home by a friend and co-worker, Luther White (R 44-46). Miss Corey, a 43-year-old lady who lived alone and was a virgin, had been severely beaten and was incoherent. She has never been able to recall what happened to her and has never identified the defendant or anyone else as her assailant.

When Mr. White arrived, he discovered a dog inside Miss Corey's house (R 60-62), though she did not own one herself (R 66). Police followed the dog, Sugarfoot, to the defendant's house where it curled up on the porch. Questioning of neighbors by police revealed that the dog belonged to the defendant who lived in that house (R 102-108). Defendant was located later that day and picked up by the police.

When the defendant was taken to police headquarters, scratches were observed on his face (R 175) and blood was found on his clothes and undershorts (R 197-199). He told police that the scratches and blood were caused by a goose he had killed.

Prior to interrogating the defendant on April 19, 1966, the police advised him that he had the right to remain silent and the right to contact a lawyer (Pre Exam, R 94-100). He was not advised of any right to a court-appointed attorney. Defendant agreed to talk with the police and told them that at the time of the crime he was with a friend, one Robert Henderson.

The police contacted Henderson in an attempt to confirm the defendant's alibi. Henderson not only refuted the alibi,

but also related certain incriminating statements made in his presence by the defendant.

*Miranda v Arizona*, 384 US 436 (1966) was decided by this Court on June 13, 1966. Defendant's trial commenced after that date on October 18, 1966. As a result, the statements made by the defendant to police were excluded as being in violation of *Miranda, supra*. Henderson, however, did testify as a witness for the prosecution. Henderson stated that the defendant arrived at his house on the day of the crime at about 1:00 p.m., while he, Henderson, was cleaning a goose he had shot (R 217-218). Henderson asked the defendant what had happened to his face and whether he had got ahold of "a wild one or something." The defendant replied "something like that" (R 223). After a few minutes Henderson asked "who it was" and the defendant replied "She's a widow woman" who was in her thirties and lived the next block over (R 224-225). It was stipulated to by the Prosecution that knowledge of Henderson was obtained through the statements made to the police by the defendant.

The defendant was convicted of rape by the jury and was sentenced to a term of 20 to 40 years imprisonment. In unanimous opinions included in the Appendix to the printed petition for a writ of certiorari, the Michigan Court of Appeals and the Michigan Supreme Court affirmed the defendant's conviction. The United States District Court, Eastern District of Michigan, granted the defendant's petition for a writ of habeas corpus stating that Henderson's testimony had been wrongly admitted into evidence at trial. The United States Court of Appeals for the Sixth Circuit affirmed the decision of the United States District Court. The decisions of both federal courts are also included in the Appendix to the petition for a writ of certiorari. This Court granted the petition for a writ of certiorari on December 3, 1973.

## SUMMARY OF ARGUMENT

The case of *Miranda v Arizona*, 384 US 436 (1966) should not apply to the instant case, as the interrogation of the present defendant occurred prior to the decision date of *Miranda, supra*. This Court should modify *Johnson v New Jersey*, 384 US 719 (1966), and adopt an "activity date" rule concerning the retroactive effect of *Miranda, supra*, as opposed to the present "trial date" rule. The date of the interrogation should be the determining factor, as police conduct prior to the decision date of *Miranda, supra*, cannot now be deterred by applying the standards of that case to a trial which commenced after *Miranda, supra*, was decided.

The testimony of a crucial prosecution witness should not be excluded from evidence because his identity was learned as a result of an allegedly involuntary statement made by the defendant. While physical evidence speaks for itself and is excluded as a "poisonous fruit," the trial testimony of an independent witness is subject to all the rigors of cross-examination as any other witness and need not be excluded. The manner in which a witness' identity is learned may go to the weight to be given to his testimony, but it should not affect the admissibility of that testimony. This is particularly true in the instant case as the defendant gave the witness' name to the police as a person who would substantiate his alibi. To exclude this witness' testimony deprives the trier of fact of crucial information, and yet serves no other rational purpose.

The statements made by the defendant in this case were voluntary even though he was not advised of his right to court appointed counsel. The rule of law concerning the



admissibility of confessions set forth in *Miranda, supra*, is too restrictive and is not required by the United States Constitution. A better rule of law would be for the trial court to examine all the attendant circumstances when determining if a confession was voluntarily given. The presence or absence of any single relevant factor should not mandate a decision in favor of either the prosecution or the defendant. Under such a rule of law, the present defendant's statement clearly was voluntary and therefore the manner in which the identity of one witness for the prosecution was obtained should not even be called into question. This Court should now adopt a rule of law concerning the admissibility of confessions which fairly protects the rights of the individual and our society as a whole.

## ARGUMENT

### I.

THE TESTIMONY OF A WITNESS SHOULD NOT BE INADMISSIBLE UNDER THE "POISONOUS FRUITS" DOCTRINE WHEN THAT WITNESS' IDENTITY WAS DISCOVERED THROUGH A PROPER PRE-MIRANDA INTERROGATION OF THE DEFENDANT WHICH DID NOT MEET THE STANDARDS SUBSEQUENTLY SET FORTH IN *MIRANDA v ARIZONA*, 384 US 436 (1966).

The initial question which this Court should consider in this cause is whether the warnings set forth in *Miranda v Arizona*, 384 US 436 (1966) should even be applicable to this defendant. The crime of which defendant Tucker was convicted occurred on April 19, 1966. The interrogation of the defendant also occurred on that same date, April 19, 1966. *Miranda, supra*, was decided subsequently on June 13, 1966. The defendant's trial commenced on

October 18, 1966. In applying the *Miranda* warnings to this case, the United States District Court relied upon *Johnson v New Jersey*, 384 US 719 (1966), which was decided by this Court one week after the *Miranda* decision. In *Johnson, supra*, this Court concluded that *Escobedo v Illinois*, 378 US 478 (1964) and *Miranda, supra*, would not be applied retroactively. Instead, the Court ruled that those two decisions would apply to all cases in which trial commenced subsequent to the decision dates of those causes.

Petitioner urges this Court to reconsider and modify its ruling in *Johnson, supra*. A more rational approach to this issue would be to apply *Miranda, supra* and *Escobedo, supra*, only to those cases in which the interrogations took place after the dates of decision in those two causes. Such an "activity date" rule as opposed to the present "trial date" rule would be totally consistent with the posture this Court has taken in other cases dealing with the question of retroactivity.

In *Desist v United States*, 394 US 244, 249 (1969), this Court set forth three factors to consider when determining whether or not a new rule of law should be applied retroactively. Those factors are: a) the purpose to be served by the new standard; b) the extent of reliance by law enforcement authorities on the old standards; and c) the effect on the administration of justice caused by a retroactive application of the new standard. This Court's rulings in *Escobedo, supra*, and *Miranda, supra*, did not pertain to the reliability of confessions, but rather were directed at preventing future acts of misconduct on the part of police officials. The Court therefore quite logically concluded in *Johnson, supra*, that no purpose would be served by setting aside past convictions, since only future acts of misconduct could be deterred. The Court also noted in

*Johnson, supra*, that law enforcement officials had fairly relied upon the decisions of this Court prior to *Escobedo, supra*, and *Miranda, supra*, and that to apply those two decisions retroactively would seriously disrupt the administration of criminal justice. *Johnson v New Jersey, supra*, 731. This same logic would seem to indicate that the date of the interrogation, not the date of the trial, is the key factor in any retroactive application of the new standards. Police conduct that occurred prior to the decision date in *Miranda, supra*, which this Court deems improper, cannot now be deterred by applying the standards of that case to a trial which commenced after *Miranda, supra* was decided.

The "activity date" rule has been adopted by this Court in other cases dealing with the retroactive application of new standards in criminal procedure. In *Stovall v Denno*, 388 US 293, 300-301 (1967), this Court chose to apply the new standards set forth in *United States v Wade*, 388 US 218 (1967) and *Gilbert v California*, 388 US 263 (1967), only to cases in which the confrontation occurred after the dates of decision in those two cases. The Court followed the same approach in *Desist v United States, supra*, 253, when it held that the standards set forth in *Katz v United States*, 389 US 347 (1967) applied only to those wiretaps occurring after the decision date of that case. Most recently in *Williams v United States*, 401 US 646 (1971), this Court held that the standards promulgated in *Chimel v California*, 395 US 752 (1969) would be applicable only to searches conducted after the decision date of that case. The fact that this Court held in *Jenkins v Delaware*, 395 US 213, 218 (1969) that the *Miranda* standards would not be applicable to retrials tried after the decision date of *Miranda, supra*, also seems to suggest an "activity date" rule would be more appropriate.

In the instant case, the defendant Tucker was advised prior to his interrogation that he had the right to remain silent and the right to contact a lawyer. Such a warning was in complete compliance with the standards then in effect. To now apply the standards set forth in *Miranda, supra*, is senseless. Such application cannot deter the "misconduct" by the police which has already occurred. Furthermore, it would seem unfair to condemn as improper the activities of the police in this case when they were acting in accordance with the standards then in effect. Neither the rights of the defendant nor the effective administration of criminal justice are assisted by such an application. Petitioner therefore requests that this Court modify *Johnson v New Jersey, supra*, in such a manner so as to make *Escobedo, supra*, and *Miranda, supra*, applicable only to cases in which the improper activity of the police took place after the decision dates of those two cases. Under such an "activity date" rule, defendant Tucker has no right to object to the testimony used against him at his trial.

The next important question for this Court to consider in this cause is whether the "poisonous fruits" doctrine should apply to the testimony of a witness whose identity is discovered as a result of improper police conduct. As stated above, the Petitioner does not believe that the police officers' conduct in this case was improper. Even if it were, however, it does not follow that the witness Henderson's testimony should be excluded.

The prime case cited and relied upon by the United States Court of Appeals was *Wong Sun v United States*, 371 US 471 (1963). In that case, incriminating statements made by the defendants themselves and physical evidence, narcotics, were admitted during the defendants' trial. This Court ruled that the statements and drugs should have

been excluded as the "poisonous fruits" of illegal arrests. In the present case, the evidence which the Court of Appeals held to be wrongly admitted was the testimony of an independent witness. No statements made by the defendant were used against him, nor was any physical evidence obtained as a result of his interrogation. As noted in footnote nine of *Harrison v United States*, 392 US 219, 223 (1968), this Court has yet to consider this issue of whether the testimony of an independent witness must be excluded as the fruit of the poisoned tree.

Presented with this question of first impression, Petitioner urges this Court to adopt a rule of law allowing the testimony of such an independent witness to be used against a defendant. Though lower courts have resolved this issue in varying manners, the best reasoned opinions were written by Chief Justice Burger in *Smith v United States*, 324 F2d 879 (DC Cir, 1963) and *Brown v United States*, 375 F2d 310 (DC Cir, 1967), when he was a judge in the United States Court of Appeals, District of Columbia Circuit.

In *Smith, supra*, the identity of a crucial witness was learned as a result of the illegal detention and interrogation of the defendant. The Court of Appeals held that the witness' testimony was admissible at the defendant's trial. Writing the majority opinion, Chief Justice Burger stated:

"Here no confessions or utterances of the appellants were used against them; tangible evidence obtained from appellants, such as the victim's watch, was suppressed along with the confessions. But a witness is not an inanimate object which like contraband narcotics, a pistol or stolen goods, 'speak for themselves.' The proffer of a living witness is not to be mechanically equated with the proffer of

inanimate evidentiary objects illegally seized. The fact that the name of a potential witness is disclosed to police is of no evidentiary significance, per se, since the living witness is an individual human personality whose attributes of will, perception, memory and volition interact to determine what testimony he will give. The uniqueness of his human process distinguishes the evidentiary character of a witness from the relative immutability of inanimate evidence." (Footnotes omitted). *Smith v United States, supra*, at p 881.

The exact same statement is true of the instant case. Henderson's eyewitness testimony was subject to full and complete cross-examination by defense counsel. The manner in which Henderson's identity was learned may go to the weight to be given to his testimony, but it should not affect the admissibility of that testimony.

This approach was reaffirmed by Chief Justice Burger in his concurring opinion in *Brown v United States*, 375 F2d 310 (DC Cir, 1967). The Chief Justice stated:

"The critical aspect of *Smith-Bowden* is that live witnesses are not 'suppressed', as inanimate objects may be. When an eyewitness is willing to give testimony, under oath and subject to all the rigors of cross-examination and penalties of perjury, he must be heard. *How he came to be in court is a matter which goes only to the weight, not the admissibility, of his testimony.*" (Emphasis supplied). *Brown v United States, supra*, at p. 319.

While physical evidence "speaks for itself," the testimony of an independent eyewitness obtained through an interrogation of the defendant is subject to all the rigors of

cross-examination as that of any other witness. Because of that distinction, the testimony of such a witness should be held admissible.

In the instant case, it is particularly unfair to exclude Henderson's testimony in order to deter the "misconduct" of the police officers. Defendant Tucker told the police that Henderson would substantiate Tucker's own story about the manner in which he received the scratches which were on his face at the time of his arrest. As a result of Tucker's exculpatory statements, the police contacted Henderson in an effort to determine if Tucker might in fact be innocent. Henderson's statement, however, unequivocally refuted Tucker's explanation, and also revealed other incriminating statements made by Tucker to Henderson. To exclude Henderson's testimony to deter the police officers' conduct makes no sense whatsoever, since the officers were attempting to substantiate the defendant's own statement when they contacted the witness whose name was given to them by the defendant. The officers would have been derelict in their duties had they not interviewed Henderson.

This Court must determine whether any rational purpose is served by excluding the testimony of an eyewitness as a "poisonous fruit." Petitioner submits that logic requires that an animate individual who can supply crucial information to a trier of fact should be allowed to do so. Any other rule of law deprives the trier of fact of being fully informed, yet accomplishes no other rational goal.



## II.

THE STANDARDS SET FORTH IN *MIRANDA v ARIZONA*, 384 US 436 (1966) ARE TOO RESTRICTIVE IN THEIR EXCLUSION OF CONFESSIONS AND ARE NOT MANDATED BY THE UNITED STATES CONSTITUTION.

The broad question of the necessity for the specific warnings set forth by this Court in *Miranda, supra*, is also raised in the instant case. If the police officers' interrogation of defendant Tucker is held to be legal despite the absence of one aspect of the *Miranda* warnings, then there is no reason whatsoever to exclude the testimony of witness Henderson, and the defendant's conviction should be affirmed.

The foundation for this Court's ruling in *Miranda, supra*, was that portion of the Fifth Amendment of the United States Constitution which states that no person "... shall be compelled in any criminal case to be a witness against himself ...". This Court has interpreted that language as requiring the exclusion from evidence of any coerced statements obtained from a defendant. The problem lies with the establishment of a fair test to determine whether or not a defendant's statements are the result of coercion. Petitioner respectfully submits that the test set forth in *Miranda, supra*, is not a fair one for law enforcement officials.

Prior to *Miranda, supra*, this Court used more flexible standards in determining whether or not a defendant's statements were involuntary, and therefore resulted in his being compelled to testify against himself. This Court had specifically held that a confession need not be excluded simply because a defendant had not first been advised of his right to counsel, or that anything he said would be



used against him. *Wilson v United States*, 162 US 613, 624 (1895). The general test for voluntariness immediately prior to *Miranda, supra*, seems best set forth in Justice Goldberg's majority opinion in *Haynes v Washington*, 373 US 503 (1963). Justice Goldberg stated:

"We have only recently held again that a confession obtained by police through the use of threats is violative of due process and that the question in each case is whether the defendant's will was overborne at the time he confessed, *Lynum v Illinois*, 372 US 528, 534, 9 L ed 2d 922, 926, 83 S Ct 917. In short, the true test of admissibility is that the confession is made freely, voluntarily and without compulsion or inducement of any sort. *Wilson v United States*, 162 US 613, 623, 40 L ed 1090, 1096, 16 S Ct 895. See also *Bram v United States*, 168 US 532, 42 L ed 568, 18 S Ct 183. And, of course, whether the confession was obtained by coercion or improper inducement can be determined only by an examination of all of the attendant circumstances. See, e.g., *Leyra v Denno*, 347 US 556, 558, 98 L ed 948, 950, 74 S Ct 716." (Footnotes omitted.) *Haynes v Washington, supra*, at 513-514.

It is noteworthy that the Court's decision in excluding the defendant's confession in *Haynes, supra*, was based upon a violation of the Due Process Clause of the Fourteenth Amendment. Under the approach set forth in *Haynes, supra*, a court examines "all of the attendant circumstances" and then makes a determination as to "whether the confession was obtained by coercion or improper inducement." Petitioner submits that this approach is more reasonable and workable than the rule of law laid down in *Miranda, supra*.

The majority opinion in *Miranda, supra*, was joined in by five Justices, while the remaining four Justices dissented in three different opinions. Petitioner urges that the rationale contained in the *Miranda* dissents is well-reasoned, and should be adopted as the majority position of this Court. As pointed out by the dissenters, there is no magical language in the Fifth Amendment which requires that the warnings set forth in *Miranda, supra*, be given prior to any interrogation of a defendant. In *Miranda, supra*, a thin majority of this Court made new law and public policy through its interpretation of the Fifth Amendment. Petitioner does not dispute this Court's right to announce such new law. Petitioner does submit, however, that the passage of time since *Miranda, supra*, was decided has illustrated that the rule of law announced in that case is not the best possible one, and that the administration of justice would be served by a modification of that interpretation.

This Court is well aware of the myriad cases which have probed and interpreted every minute aspect of the *Miranda* warnings. Citation of all those cases would serve no reasonable purpose in this brief. Suffice it to say that today, seven years after *Miranda, supra*, a trial judge still cannot rule upon the admissibility of a confession with any degree of confidence that his decision will withstand appellate attack. Furthermore, the mere giving of the warnings in and of itself does not guarantee that a confession has not been compelled. Numerous other factors can also contribute to an atmosphere of coercion which results in an involuntary confession. For that very reason, all the attendant circumstances should be examined by the trial court. Only after such a complete examination is the trial court properly qualified to determine whether or not a defendant's statements were involuntarily extract-

ed from him. The presence or absence of any single relevant factor should not result in a conclusive decision in favor of either the prosecution or the defendant.

The approach set forth by Petitioner is basically that adopted by the Congress of the United States in the Omnibus Crime Control and Safe Streets Act of 1968. The portion of that act dealing with the admissibility of confessions is contained in 18 USC §3501 and states:

“§3501. Admissibility of confessions

(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such

defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

(c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate or other officer empowered to commit persons charged with offense against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: *Provided*, That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of

transportation and the distance to be traveled to the nearest available such magistrate or other officer.

(d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention.

(e) As used in this section, the term 'confession' means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing.

Added Pub L 90-351, Title II, §701(a), June 19, 1968, 82 Stat 210, and amended Pub L 90-578, Title III, §301(a) (3), Oct. 17, 1968, 82 Stat 1115."

Though by its own terms 18 USC §3501 applies only to federal prosecutions, the intent of Congress clearly was to supply a reasonable and workable rule of law as an alternative to the restrictive rule of law set forth in *Miranda, supra*. Petitioner submits that 18 USC §3501 is in compliance with both the Fifth and Fourteenth Amendments, and represents a feasible approach in this problem area of criminal law and procedure.

This Court has already indicated a willingness to allow statements made by a defendant to be admitted into evidence under some circumstances when proper *Miranda* warnings have not been given. In *Harris v New York*, 401 US 222 (1970), the defendant made incriminating statements to police officers after his arrest and before he was advised of his right to appointed counsel. Though the statements were not introduced in the prosecutor's case in chief, they were used for impeachment purposes after the defendant

had testified in his own behalf. This Court held that such use of the statements was proper for the purpose of impeaching the defendant's credibility. The Court noted that the statements were neither coerced nor involuntarily. Under such circumstances, it would seem proper to admit the statements in the prosecution's case in chief as well. The determining factor should be whether the statements are voluntarily made, not whether some technical warning was given.

The only factor that led the United States District Court to conclude that defendant Tucker's statements were "involuntary" was the fact that he had not been advised of his right to court appointed counsel. There is no allegation that the defendant was either physically or verbally abused in any manner. His statements, on their face, were not even incriminating, but rather were exculpatory. The statements harmed the defendant only in that they led the police officers to another individual who, much to the defendant's chagrin, testified truthfully. Under these circumstances the defendant's initial statement to the officers should be deemed voluntary, and the manner in which the police became aware of witness Henderson should not be open to question. Such a ruling would bar any application of the "poisonous fruits" doctrine to this case.

Petitioner feels some need to assure this Court that the approach suggested in this brief would not result in a rash of improper police activity for the purpose of obtaining confessions. The vast majority of law enforcement officials throughout this country conscientiously attempt to follow the law themselves. The *Miranda* warnings will continue to be given as one means of illustrating to trial courts that a defendant's confession was voluntarily made. The

approach suggested by Petitioner simply means that in a case such as the instant one, the content of the voluntary statements of a professional felon will not be excluded from evidence due to a technical defect in the warnings given. The time has come as urged by Justice Stewart in his dissent in *Mathis v United States*, 391 US 1, 6 (1968) to reconsider *Miranda, supra*, and adopt a rule of law fully in accord with the United States Constitution which properly protects the rights of both the individual and our society as a whole.

### CONCLUSION

For the reasons stated, it is respectfully submitted that the decision in this cause of the United States Court of Appeals, Sixth Circuit, be reversed, and that the Respondent's conviction be affirmed.

Respectfully submitted,

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State of Michigan

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No. 73-482

**IN THE SUPREME COURT OF THE  
UNITED STATES****OCTOBER TERM, 1973**

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**STATE OF MICHIGAN,**  
*Petitioner,***VS.****THOMAS W. TUCKER,**  
*Respondent.*

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**On Writ of Certiorari to the United States Court of  
Appeals for the Sixth Circuit**

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**BRIEF OF CIVIL LIBERTIES COMMITTEE, STATE BAR  
OF MICHIGAN AS AMICI CURIAE IN SUPPORT OF  
THE RESPONDENT**

This brief is filed pursuant to Rule 42 of the Supreme Court Rules. Consent to file has been granted by the Office of the Prosecutor of Oakland County Michigan, counsel for the Petitioner, and by Kenneth M. Mogill, Esq., counsel for the Respondent. Letters of consent of both parties have been filed with the Clerk of the Court.

**INTEREST OF AMICUS CURIAE**

The views expressed herein are those of the State Bar of Michigan, Committee on Civil Liberties only and do not necessarily represent the views of the Bar as a whole.

The State Bar of Michigan Committee on Civil Liberties was established by the parent organization to consider the

effect of legislation, legal decisions and state action on the civil liberties and Constitutional rights of Michigan citizens. It is the belief of the Michigan State Bar Civil Liberties Committee that this case raises serious questions as to the preservation of Constitutional liberties presently possessed by citizens of the State of Michigan. The Civil Liberties Committee of the Michigan State Bar has been actively involved in the protection of the civil liberties of Michigan citizens with the recognition that the liberties of its citizens must be preserved but balanced with rational police conduct. It is the belief of the Committee that the retention and advancement of presently held Constitutional rights of Michigan citizens best protects their rights, the effectiveness of Michigan's law enforcement agencies, and the administration of justice in Michigan Courts. Any retrenchment on present policies would not improve law enforcement practices, would grievously and irreparably harm the civil liberties of Michigan citizens and incalculably impair the administration of justice in Michigan courts.

### SUMMARY OF ARGUMENT — ISSUE I

Traditional notions of Fourth and Fifth Amendment guarantees recognize that the vitality of these Amendments lies in their mutual interdependence as well as their mutual dependence upon exclusionary rules evidence. Such exclusionary rules operate to render inadmissible evidence directly obtained by illegal methods, and any form of evidence derived from investigative leads arising from the initial illegal intrusion. The application of the exclusionary rules of evidence to *Miranda* violations, finds its justification in the concentricity of Fourth and Fifth Amendment protections forming the basis of the *Miranda* requirements. The exclusionary rules of evidence are virtually the only viable means of insuring the vindication of an individual's constitutional rights in the face of unwarranted government intrusion. The government is thus forewarned that any illegal activity will not be judicially sanctioned by acquiescing in admission into a court of law evidence ob-



tained through illegal methods. The exclusion of direct evidence as well as derivative evidence, be it testimonial or physical in nature, furthermore, serves the essential purpose of insuring the integrity of the judicial process.

## SUMMARY OF ARGUMENT — ISSUE II

The deleterious impact of the *Miranda* standards, forewarned by the dissents in *Miranda* and by critics of the *Miranda* majority, have failed to materialize. Post-*Miranda* studies assert that while the number of confessions obtained by law enforcement officials has declined, convictions in the post-*Miranda* period have remained constant or have risen. Moreover, law enforcement officers concede that *Miranda* has presented no serious impediment to effective law enforcement. The *Miranda* warnings represent a consistent, easily implemented standard by which law enforcement personnel can advise a suspect of Constitutional rights which obtain during custodial interrogations. The warnings are currently an integral, non-disruptive requirement of the law enforcement function.

A regression to the "totality of the circumstances" test for determinations of voluntariness, as suggested by Petitioner, would serve to reimplement an ineffective and unmanageable standard. It would encourage technical and "minor" violations of individual Constitutional rights in order to obtain confessions. A return to the totality test will signify that trials, in confession cases, represent only an appeal from a "successful" interrogation.

This Court properly determined in *Miranda* that custodial interrogations are inherently coercive. *Miranda* warnings assist in militating against such coercive pressures. *Miranda* safeguards and encourages the exercise of individual Constitutional rights without significant deleterious effects upon law enforcement officials or the administration of justice. Abandonment of these safeguards would have no basis either in logic or precedent. *Miranda v Arizona* should be retained in its entirety.

### SUMMARY OF ARGUMENT — ISSUE III

The question of whether federal habeas corpus is an appropriate forum for reviewing alleged violations of a petitioner's Fifth Amendment rights is also before this Court. Amici first urges this Court to closely scrutinize the contention put forth by some that federal habeas corpus jurisdiction should be limited to cases which present a colorable claim of innocence. Such a proposition clearly intimates a greater federal involvement in the retrying of facts already resolved by the state trial courts. Thus, the proposition is counterproductive to the desired ends of preserving state court integrity and autonomy and, ultimately, minimizing friction between the state and federal judicial systems.

To put forth an argument that federal habeas corpus jurisdiction should be concerned with a colorable claim of innocence is to misunderstand the institutional setting of state court criminal proceedings vis-a-vis federal habeas corpus collateral review. State courts tend to have as their *primary* objective the enforcement of state substantive criminal law, and therefore may subordinate the individual's right to protection from improper state action. The federal courts are in a unique position, being a step removed from the overriding (state) goal of enforcement of state law, to undertake an objective second look at the state's application of the Constitution to the factual setting of the case. Thus, the colorable claim of innocence theory misses the crucial point that, in light of the distinct institutional function of the federal courts (as opposed to the state courts), the federal courts must be concerned with the factual setting of a case *only insofar* as it is necessary to review whether the state jurisdiction correctly applied the Constitutional standard in issue to the facts.

Amici also have brought to the Court's attention the fact that, even if this Court should limit federal habeas corpus jurisdiction in relation to appeals based on Fourth Amendment exclusionary violations, as suggested by Mr. Justice Powell's concurring opinion in *Schneckloth v Bustamonte*, no such limitation should be placed on federal

habeas review of Fifth Amendment claims. The reason for such a stance is based on the nature of the protections afforded by each Amendment. If the argument that the nature of Fourth Amendment protections focus on the security of one's privacy from state intrusion is meritorious, then it might be concluded that a Fourth Amendment violation does not touch upon the fairness of the trial itself, and therefore should not be grounds for federal habeas review. However, it is generally agreed that the Fifth Amendment cuts to the very heart of the truth-determining process, especially when considered in light of custodial interrogation. As a consequence, the reliability of the truth-determining process and fairness of the trial is usually in issue when a Fifth Amendment question is at stake. Thus, the considerations used to buttress the argument for limiting federal habeas corpus Fourth Amendment review are inapplicable to a discussion of any possible limitation on federal habeas corpus Fifth Amendment review.

## ARGUMENT

I. Where statements are obtained from a criminal accused in violation of *Miranda v Arizona*, derivative evidence obtained as a fruit of that illegality must be suppressed, whether that evidence be physical or testimonial in character.

*Miranda v Arizona*, 384 US 719, 86 S Ct 1772, 16 L Ed 2d 694 (1966) applying the Fifth Amendment held that all statements made by one who is "in custody" at the time of their declaration, whether they are characterized as confessions or as admissions, inculpatory or exculpatory, be excluded from the evidence if the *Miranda* warnings were not properly given and if no valid waiver is made of the privilege against self-incrimination. Not only is the direct statement to be suppressed but incriminating evidence derived from investigative leads resulting from the direct statement regardless of whether that derivative evidence

be testimonial or physical in nature, must also be suppressed. *Wong Sun v United States*, 371 US 471, 83 S Ct 407, 9 L Ed 2d 441 (1963); *Nardone v United States*, 308 US 388, 60 S Ct 266, 84 L Ed 307 (1939); *Silverthorne Lumber Co v United States*, 251 US 385, 40 S Ct 182, 64 L Ed 319 (1920); *Davis v Mississippi*, 394 US 721, 81 S Ct 1394, 22 L Ed 2d 676 (1969); *Kastigar v United States*, 406 US 441, 92 S Ct 1653, 32 L Ed 2d 212 (1972). Such a rule is virtually the only jurisprudential method capable of effectively vindicating Fourth and Fifth Amendment constitutional guarantees to inviolate personality: the Government is forewarned that an illegal intrusion upon these constitutional rights should not be sanctioned by participation in the wrong through judicial acquiescence in the use of illegally obtained evidence.

As a practical matter, the rule excluding all forms of derivative evidence is of importance in terms of possible undesirable restraints on law enforcement processes. Clearly, police interrogate suspects to obtain either (1) statements that can later be presented in court as evidence, or (2) leads from a suspect on the basis of which they can discover real or demonstrative evidence, or identify prosecution witnesses, and thus present a persuasive array of proof in court. Such purposes and procedures are unquestionably an integral part of effective law enforcement and investigation of crime. That these purposes and procedures have not been adversely affected by the *Miranda* exclusionary rule is manifest from the abundance of studies examining this precise concern cited elsewhere in this amicus curiae as well as in Respondent's Brief. To the contrary, these studies evince the general conclusion that *Miranda*'s effect on criminal convictions has been at worst negligible, and at best a positive inspiration for more scientific, professional and precise law enforcement practices. Little factual support exists, therefore, for seriously arguing that an exclusionary rule requiring the suppression of evidence derived from statements obtained in violation of *Miranda*, will traumatize and debilitate law enforcement.

The exclusionary rule as it relates to derivative evidence has long been considered a legitimate and essential method

of insuring the enforcement and integrity of Fourth Amendment Constitutional rights. The purpose of such exclusionary rules is clearly not always to insure the trustworthiness of the evidence so derived. Rather, the exclusionary rule has been utilized to enforce the Fourth Amendment mandate requiring respect for the sanctity of the division of governmental powers concept: that the executive function of law enforcement shall be separate from and reviewable by the judicial branch, i.e. before the executive shall act to invade a citizen's privacy through arrest, search, or seizure, the legitimacy of that action shall be passed upon by objective and neutral judgment of the judiciary. *Johnson v United States*, 333 US 10, 68 S Ct 361, 92 L Ed 436 (1947); *Mapp v Ohio*, 367 US 483, 81 S Ct 1684, 6 L Ed 2d 1081, (1961); *Weeks v United States*, 232 US 383, 34 S Ct 341, 58 L Ed 652 (1914).

The very integrity of the individual citizen's Fourth Amendment right to be free from illegal search and seizures is itself an independent justification for the exclusionary rule. *Coolidge v New Hampshire*, 403 US 443, 91 S Ct 2022, 29 L Ed 2d 564 (1971); *Davis v Mississippi*, 394 US 721, 89 S Ct 1394, 22 L Ed 2d 676 (1969). Furthermore, the individual citizen's right to privacy insured by the Fourth Amendment, is vindicated by the exclusionary rule which suppresses the statements of the individual obtained without his knowledge and permission or without a search warrant. *Katz v United States*, 389 US 347, 88 S Ct 507, 19 L Ed 2d 576 (1967). To virtually every aspect of Fourth Amendment rights the exclusionary rule of evidence as well as the derivative evidence exclusionary rule have been applied.

Respondent submits that no good reason exists not to apply the derivative evidence exclusionary rule to the Fifth Amendment, and that, in fact, logic and precedent compels such a result.

The historical legal precedent most frequently celebrated as the antecedent for the Fourth and Fifth Amendments is *Entick v Carrington*, 19 Howell's State Trials 1029 (CP 1765). In *Entick*, Lord Camden laid down two distinct principles: that general search warrants are unlawful because of their uncertainty; and that searches for evidence

are unlawful because they infringe the privilege against self-incrimination:

“It is very certain, that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, failing upon the innocent as well as the guilty, would be both cruel and unjust, and it should seem, that search for evidence is disallowed upon the same principle.” at 1073.

Lord Camden's double focus was carried over into the structure of the Fourth Amendment. See Lasson, “The History and Development of the Fourth Amendment to the United States Constitution” (1937); Fraenkel, “Concerning Searches and Seizures” 34 Harv L Rev 361 (1921). The two clauses of the Fourth Amendment are in the conjunctive, and plainly have distinct functions. The Warrant Clause was aimed specifically at the evil of the general warrant, often regarded as the single immediate cause of the American Revolution. See 10 John Adams, Works 247. But the first clause embodies a more encompassing principle. It is, in light of the *Entick* decision, that government ought not to have the untrammelled right to extract evidence from people. Thus viewed, the Fourth Amendment is complimentary to the Fifth. *Feldman v United States*, 332 US 487, 64 S Ct 1082, 88 L Ed 1408 (1943). In *Boyd v United States*, 116 US 616, 633, 6 S Ct 524, 29 L Ed 746 (1885), the U.S. Supreme Court described the vital interaction of the Fourth and Fifth Amendments this way:

“We have already noticed the intimate relation between the two amendments. They throw great light on each other. For the ‘unreasonable searches and seizures’ condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man ‘in a criminal case to be a witness against himself’, which is condemned in the Fifth Amendment, throws light on the question as to what is an ‘unreasonable search and seizure’ within the

meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself."

*Boyd's* basic principle, that the Fourth and Fifth Amendments interact to create a comprehensive right to inviolate personality has been repeatedly approved in the decisions of the U.S. Supreme Court. *Bram v United States*, 168 US 532, 18 S Ct 183, 42 L Ed 568 (1897); *Hale v Henkel*, 201 US 43, 26 S Ct 370, 50 L Ed 652 (1905); *Weeks v United States*, *supra*; *Gouled v United States*, 255 US 298, 41 S Ct 261, 65 L Ed 647 (1920); *Amos v United States*, 255 US 313, 41 S Ct 266, 65 L Ed 654 (1920); *Agnello v United States*, 269 US 20, 46 S Ct 4, 70 L Ed 145 (1925); *McGuire v United States*, 273 US 95, 47 S Ct 259, 71 L Ed 556 (1927); *United States v Lefkowitz*, 285 US 452, 52 S Ct 420, 76 L Ed 877 (1931); *Feldman v United States*, *supra*; *Davis v United States*, 328 US 582, 66 S Ct 1256, 90 L Ed 1453 (1945); *Zap v United States*, 328 US 624, 66 S Ct 1277, 90 L Ed 1477 (1945).

This Court, furthermore, has consistently insisted that the maintenance of the right to privacy shall be enforced by liberal construction of the Fourth Amendment in favor of the individual. *Byars v United States*, 273 US 28, 47 S Ct 248, 71 L Ed 520 (1926); *United States v Lefkowitz*, *supra*; *Graw v United States*, 287 US 124, 53 S Ct 38, 77 L Ed 212 (1932).

This Court's liberal construction of the Fourth Amendment is paralleled by similarity in construction of the Fifth Amendment. In *Counselman v Hitchcock*, 142 US 547, 12 S Ct 195, 35 L Ed 1110 (1892), this Court held that a Federal immunity statute failed to proscribe evidence derived from compelled testimony. Accordingly, under the principle that a grant of immunity cannot supplant the Fifth Amendment privilege, and is not sufficient to compel testimony over a claim of the privilege, unless the scope of the grant of immunity is coextensive with the scope of the privilege, the witness' refusal to testify was held

proper. The precise holding of *Counselman* on this point declared:

“... that legislation cannot abridge a constitutional privilege, and that it cannot replace or supply (sic) one, at least unless it is so broad as to have the same extent in scope and effect.” *Id.*, at 585.

The holding in *Counselman* clearly could not have been reached unless the Court was willing to construe the scope of the Fifth Amendment as excluding not only direct information from a violation of the privilege, but indirect or derivative information as well.

In *Murphy v Waterfront Commission*, 378 US 52, 84 S Ct 1594, 12 L Ed 2d 678 (1964) the Court was presented with the question of whether a state could compel a witness, whom the state had immunized under its law from prosecution, to give testimony that might then be used to convict him of a federal crime. Applying the principle adopted that same day in *Malloy v Hogan*, 378 US 1, 84 S Ct 1489, 12 L Ed 2d 653 (1964) that the Fifth Amendment privilege applicable to the states through the Fourteenth Amendment, the *Murphy* court held:

“(A) state witness may not be compelled to give testimony which may be incriminating under federal law *unless the compelled testimony and its fruits cannot be used in any manner* by federal officials in connection with a criminal prosecution against him. We conclude, moreover, that in order to impliment this constitutional rule and accommodate the interests of the State and Federal Government in investigating and prosecuting crime, the Federal Government must be prohibited from making any such use of compelled testimony and its fruits.” *Id.* at 79 (emphasis added).

Addressing itself to the question of dispelling the taint of evidence sought to be used against such a witness the court went on to direct that:

“Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities



have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence." *Id.* at 79\*.

In emphasizing this latter rule, the Court was requiring that the Defendant be placed in "substantially the same position as if the witness had claimed his (Fifth Amendment) privilege in the absence of a state grant of immunity." (parenthesis added) (*Ibid*): that neither direct evidence obtained from the testimony nor evidence derived from such testimony would be admissible against the defendant in a subsequent criminal prosecution.

In *Kastigar v United States*, 406 US 441, 92 S Ct 1653, 32 L Ed 2d 212 (1972), the U.S. Supreme Court was presented with:

"... the question whether the United States Government may compel testimony from an unwilling witness, who invokes the Fifth Amendment against compulsory self-incrimination, by conferring on the witness immunity from use of the compelled testimony in subsequent criminal proceedings, as well as immunity from use of evidence derived from testimony." *Id.* at 442.

The statute conferring the immunity on defendant Kastigar reads in pertinent part:

"(N)o testimony or other information compelled under the order (or any information indirectly or indirectly derived from such testimony of other information) may be used against the witness in any criminal case...." 18 USC §6002.

The Supreme Court interpreted this statute as providing a total prohibition on use so comprehensive, as to bar both the utilization of compelled testimony even as to an "in-

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\* See also *Albertson v Subversive Activities Control Board*, 382 US 70, 86 S Ct 194, 15 L Ed 2d 165 (1965).

vestigatory lead",\* and the use of evidence obtained by focusing investigation on a witness as a result of his compelled disclosures.

The Court in *Kastigar* concluded that the requirements of the Fifth Amendment were satisfied by the granting of use immunity, and not transactional immunity. In reaching this result, *Kastigar* relied heavily upon *Murphy v Waterfront Commission*, quoting with approval the following pertinent language:

"We conclude, moreover, that in order to implement this constitutional rule and accommodate the interests of the State and Federal Governments in investigating and prosecuting crime, the Federal Government must be prohibited from making any use of such compelled testimony and its fruits." (citations omitted) *Kastigar*, *supra*, at 406.

*Kastigar* determined that the right of the government to prosecute would be preserved where the government could establish that their evidence offered against the defendant in a subsequent prosecution was free of taint and derived from an independent, legitimate source. This evidentiary requirement, however, is not to be taken lightly as it goes to the very core of the Fifth Amendment protection. *Kastigar's* language underscores this regard:

"This burden of proof, which we reaffirm as appropriate, is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." at 406 US 460.

That this evidentiary test and burden of proof is to be applied not only to testimonial immunity situations but to

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\* On this point, Justice Powell cited *Albertson v Subversive Activities Control Board*, *supra*, albeit in several footnotes. 406 US at 455, 458, 460. *Albertson* determined that the Fifth Amendment privilege precludes the use of an admission as an investigatory lead, where an immunity statute failed to confer as comprehensive a safeguard against derivative use. *Id* at 382 US 80.

any invocation of the Fifth Amendment privilege itself was clearly manifested in *Kastigar*:

"This is a very substantial protection, commensurate with that resulting from invoking the privilege itself."

\* \* \*

"The statutory proscription is analogous to the Fifth Amendment requirement in cases of coerced confessions. A coerced confession revealing leads as testimony given in exchange for immunity, is inadmissible in a criminal trial but it does not bar prosecution." At 406 US 461.

It is submitted, herein, that the purpose of *Miranda v Arizona*, *supra*, was to prevent coerced confessions by insuring that certain constitutional protections were made known to the accused held "in custody." Failure to apprise an accused of these safeguards, renders any confession subsequently made, involuntary, and coerced. Such a confession must be suppressed. Similarly, any investigatory leads from that confession ultimately disclosing other incriminating evidence must be suppressed unless the Government can eliminate the taint by demonstrating that such evidence was the result of an independent and legitimate source.

The Fifth Amendment and *Miranda* are not the sole sources of these rules. It is the intimate interaction between the Fifth Amendment and the Fourth Amendment, recognized since the promulgation of those Amendments, that constitutes the basis of their formulation. The interrogation of an accused by police is a search; it is a search for information relating to a crime that the police may have probable cause to believe exists within that person's knowledge. Where *Miranda* warnings are not given or defectively given, and a statement obtained, that statement is the fruit of a Fifth Amendment violation, as well as the product of an illegal search and seizure. As shown above, both the Fourth and Fifth Amendments require the suppression of both the direct evidence as well as derivative evi-

dence unless the Government can establish an independent source free of taint for such evidence.

It is the position of this amicus curiae, then, that in the case where a statement obtained in violation of *Miranda* provides investigative leads resulting in the discovery of other evidence incriminating the accused, both the statement itself and the derivative evidence must be suppressed as violations of the Fourth and Fifth Amendments, subject only to proof by the Government of the absence of taint.

II. The standards enunciated by this Court in *Miranda v Arizona* represent minimum safeguards against coercive admissions and confessions.

A. The *Miranda* standards are a manageable non-disruptive requirement of the law enforcement function.

This Court's decision in *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966) properly declared that "[u]nless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice." 384 at 458. In order to compel the observance of such "protective devices" this Court promulgated the mandatory "Miranda Warnings", 384 at 478, 479. The "Warnings" requirement has, to date, been effectively operative for some seven and one-half years.

Petitioner and Amici in Support of Petitioner, Americans for Effective Law Enforcement, and the International Association of Chiefs of Police (hereinafter cited AELE-IACP), now come before this Court to claim that the standards enunciated in *Miranda* are too restrictive and are "unfair for law enforcement officials". Brief of Petitioner, p. 14. Further, Petitioner and Amici claim this Court must now "balance" an individual's Fifth Amendment right to be free from the use against him of coerced or compelled admissions or confessions. Brief of Amici, AELE-IACP, p. 25. Amicus on behalf of Respondent vigorously disputes both of these claims.

Contrary to the assertions of both Petitioner and Amici AELE-IACP, the standards required by *Miranda* do not seriously impede law enforcement. While, in fact, the number of confessions obtained had decreased, the number of convictions have remained, despite this development, constant. Seeburger & Wettick "*Miranda* in Pittsburgh — A Statistical Study," 29 U Pitt L Rev 1, 19 (1967). Perhaps in recognition, the most recent study of the attitudes of law enforcement officials reveals that approximately three-quarters of those interviewed "... asserted that confessions were becoming less important in the successful prosecution of cases." Stephens, Flanders and Cannon, "Law Enforcement and the Supreme Court: Police Perceptions of the *Miranda* Requirements", 39 Tenn L Rev 407, 421 (1972).

Essentially, most officers seem to view *Miranda* as an annoyance to be dealt with prior to routine questioning:

"... most officers in each jurisdiction continued to express strong misgivings about the *Miranda* procedure long after it had become a routine part of their work. They seemed to view the decision as a 'stumbling block' to investigation — not so much because of any particular effect on the questioning process per se, but because, as one officer remarked, it required them 'to go through the ritual and paper work and legal technicalities.' They resented the alleged inconvenience and, to an even greater extent, the perceived affront implicit in the requirement of advising suspects prior to interrogation. Most of them were further annoyed by their belief that the justices who fashioned the *Miranda* rules had little understanding or appreciation of the difficulties and hazards of police work. Many of the responses to our questions were, in short, reminiscent of the attacks leveled at the Supreme Court by its most vocal law enforcement critics. We noted, however, that the negative responses of most detectives were less extreme, less embittered, and less direct than many of the public condemnations that greeted *Miranda*." Police Perceptions, *supra*, at 431.

Other studies have similarly rejected any proposition that the *Miranda* standards have had a detrimental effect on the efficiency of law enforcement officials. See Younger, "Results of a Survey Conducted in the District Attorney's Office of Los Angeles County Regarding the Effect of the *Miranda* Decision upon the Prosecution of Felony Cases", 5 Am. Crim. L. Q. 32 (1966); N. Sobel, "The New Confession Standards: *Miranda v Arizona*, A Legal Perspective, A Practical Perspective" (1966); Bell, "Racism in American Courts: Cause for Black Disruption or Despair?" 61 Calif L Rev 165, 185 (1973); Mosk, "The Anatomy of Violence," Beverly Hills B J, 10, 15 (Oct., 1968). Obviously both common sense and the aforementioned studies reveal that while the *Miranda* requirements may be aggravating to law enforcement officers, they are neither too complex to implement nor detrimental to effectiveness.

Amici AELE-IACP next assert that the rigidity of the *Miranda* standards "... often requires the reversal of convictions and the freeing of criminal suspects ...". Brief of AELE-IACP p. 16. In support of this contention, nine actual cases were cited in which "technical" *Miranda* violations required reversal. Amici implies through presentation of these cases that a technical *Miranda* violation substantially impaired law enforcement. Amici failed, however, to recognize or apprise this Court of the eventual judicious disposition of each case; more specifically, that in six of these cases new trials were ordered, in two, trials continued without the improper confession, and in one, the appellate court sua sponte imposed a verdict of manslaughter in the absence of the defendant's confession. In essence, these cases reveal nothing more than the routine, mechanical application, and normal consequences of any rule of law established by this Court.

Amicus for Respondent fully concurs with and reasserts the position taken by Respondent and in support also cites to this Court the numerous post-*Miranda* studies which have consistently revealed that neither law enforcement nor the judicial system have been impaired by application of the *Miranda* Standards. Cf. Younger, "Interrogation of Criminal Defendants — Some Views on *Miranda v Arizona*," 35 Fordham L Rev 255 (1966); Note, "Interroga-

tions in New Haven: The Impact of *Miranda*," 76 Yale L J 1519 (1967); Griffiths & Ayres, "A Postscript to the *Miranda* Project: Interrogation of Draft Protesters" 77 Yale L J 300 (1967); Seeburger & Wettick, "*Miranda* in Pittsburgh — A Statistical Study," 29 U Pitt L Rev 1 (1967); Medalie, Zeitz & Alexander, "Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement *Miranda*," 66 Mich L Rev 1347 (1968); McCullough, "Balancing the Rights of the Accused and the Public in Constitutional Probity," 54 ABAJ 273 (1968); Driver, "Confessions and the Social Psychology of Coercion," 82 Harv L Rev 42 (1968); Zeitz, Medalie & Alexander, "Anomie, Powerlessness & Police Interrogation," 60 J Cr L Cr PS 314 (1969); Leiken, "Police Interrogation in Colorado," 47 Cenv L J 1 (1970). Respondent proffers as further support of the absence of deleterious effects of the *Miranda* requirements the accord voiced by Petitioner's neighboring Prosecuting Attorney, William A. Cahalan of Wayne County, Michigan:

"It is my feeling, however, that the prescriptions of the *Miranda* decision can be abided with by law enforcement officials without any great detriment to the interrogation process. There are, of course, inevitably, some cases that will have to be rejected until such time as the law enforcement officers adjust to the new rule and make their investigations correspond therewith.

"I am aware of Mr. Younger's statement concerning the *Miranda* decision and its effect on the cases in his office, and I am in hearty accord with his appraisal of that decision." Marden & Silverstein, "The Growing Importance of Criminal Law", 53 ABAJ 511, 513 FN 20 (1967).

It thus appears that none of the horrors imagined by the *Miranda* dissenters and *Miranda* critics have come to pass. Experience now reveals that the *Miranda* requirements have not occasioned the mass release or acquittals envisioned. 384 US at 542. Nor has *Miranda* significantly altered the number of convictions. Rather, the *Miranda*

Warnings have become fully and effectively assimilated into the daily practices of law enforcement officials and the judicial system. There is clearly no basis for an assertion that the *Miranda* standards have had a detrimental effect upon the administration of justice.

**B. The *Miranda* standards satisfy a legitimate and continuing concern for the integrity of custodial interrogations.**

Almost two hundred years ago, in *Hawkins*; *Pleas of the Crown*, the frailty of the human mind during intense questioning was recognized:

“The human mind under the pressure of calamity, is easily seduced; and is liable, in the alarm of danger, to acknowledge indiscriminately a falsehood or a truth, as different agitations may prevail. A confession, therefore, whether made upon an official examination or in discourse with private persons, which is obtained from a defendant, either by the flattery of hope, or by the impressions of fear, however slightly the emotions may be implanted, (*vide*, O.B. 1786, page 387), is not admissible evidence; for the law will not suffer a prisoner to be made the deluded instrument of his own conviction.” *Pleas of the Crown*, *supra*, Section 3, Chapter 46.

A similar recognition prompted this Court in *Miranda* to attempt to protect an individual's Fifth Amendment privilege against compulsory self-incrimination during custodial interrogation.

“We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely.” 384 US at 467.



As mentioned earlier, Petitioner's challenge to *Miranda* is essentially two pronged. He first attempts to verify his claim that *Miranda* is restrictive and unfair; he then proceeds to claim that the remedy lies in reviving a test unemployed by this Court in over ten years. *Haynes v Washington*, 373 US 503, 83 S Ct 1336; 10 L Ed 2d 513 (1963). Basically, Petitioner recommends readoption of the "totality of the circumstances" test, with the presence or absence of warnings also considered, as the basis for admissibility of confessions. Amicus for Respondent challenge both the efficacy and the intellectual integrity of regressing to such a standard.

Initially, the "totality of the circumstances" test is challenged on the basis that it is simply ineffective and unmanageable. Although accompanied by the full impact of embellished due process language, that test requires (a) a showing by the undisputed facts, *Stroble v California*, 343 US 181, 190, 72 S Ct 599; 96 L Ed 872 (1951), *Haynes, supra*, 373 US at 514; (b) that the accused's will was overborne at the time he confessed, *Haynes, supra*, 373 US at 513; *Lynumn v Illinois*, 372 US 528, 534; 83 S Ct 917; 9 L Ed 2d 922 (1963); (c) so that the confession cannot be deemed "the product of a rational intellect and a free will", *Blackburn v Alabama*, 361 US 199, 208; 80 S Ct 274; 4 L Ed 2d 242 (1960). Thus, the test compels a defendant to produce undisputed facts from an incommunicado interrogation conducted by an adverse party. Moreover, those facts must reveal defendant's will to have been overborne at the time of his confession. These criteria hardly represent objective demonstrable standards relating to the machinations and effects of in-custody interrogations. Indeed, in light of the post-*Miranda* commentaries and studies revealing the subtle psychological and behavioristic influences utilized in interrogations, (See, e.g., Foster, "Confessions and the Station House Syndrome", 18 De Paul L Rev 683 (1969); Cray, "Criminal Interrogations and Confessions: The Ethical Imperative", 1968 Wis L Rev 173 (1968)), a return to the "totality of the circumstances" test would seem, at best, grossly naive, and, at worst, palpably callous.

Equally objectionable in a return to the test is the implicit authorization to law enforcement officials of "minor"

violations of Constitutional rights. Any retrenchment of the *Miranda* requirements suggests such violations in geometric proportions. Opportunity for officers to impose increasingly flagrant pressures to confess is "justified", ultimately, by the fact that a suspect's guilt is clearly exhibited by his confession. The circularity of such justifications is obvious and serves only to denigrate the integrity of any attempt to determine voluntariness.

Any regression to the pre-*Miranda* "totality" test will signify, clearly, a return to the concept that a trial, in confession cases, represents only the appeal from interrogation. As such, the unaware, uninformed defendant finds trial to be merely an official forum for the admission of the dispositive confession. Perhaps the concept has been most aptly described by Yale Kamisar:

"Police interrogators may now hurl 'jolting questions' where once they swung telephone books; may now 'play on the emotions' where once they resorted to physical violence, but it is no less true today than it was thirty years ago that

'[i]n every city our police hold what can only be called outlaw tribunals, — informal and secret inquisitions of arrested persons, — which are, terminology aside, actual and very vigorous trials for crime.'\* Centering all upon the confession, proud of it, staking everything upon it, the major canon of American police work is based upon the nullification of the most truly libertarian clause of the Fifth Amendment. \* \* \* The legal courts come into operation only after the police are through; they are reduced to the position of merely ratifying the plea of guilt which the police have obtained, or else holding trials over the minor percentage of arrested persons about whom the police could reach no conclusion. \* \* \* The inquisition held by the police before trial is the outstanding feature of American criminal justice, though no statute recognizes its existence.'

"The courtroom is a splendid place where defense attorneys bellow and strut and prosecuting attorneys

are hemmed in at many turns. But what happens before an accused reaches the safety and enjoys the comfort of this veritable mansion. Ah, there's the rub. Typically he must first pass through a much less pretentious edifice, a police station with bare back rooms and locked doors.

"In this 'gatehouse' of American criminal procedure — through which most defendants journey and beyond which many never get — the enemy of the state is a depersonalized 'subject' to be 'sized up' and subjected to 'interrogation tactics and techniques most appropriate for the occasion'; he is 'game' to be stalked and cornered. Here, ideals are checked at the door, 'realities' faced, and the prestige of law enforcement vindicated. Once he leaves the 'gatehouse' and enters the 'mansion' — if he ever gets there — the enemy of the state is repersonalized, even dignified, the public invited, and a stirring ceremony in honor of individual freedom from law enforcement celebrated." Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, in *Criminal Justice in Our Time* (1965), [Author's citations omitted].

This Court explicitly recognized, in *Miranda*, the forcefulness of these arguments. In response, this Court categorically advised the Nation's legal and law enforcement communities that it found as a matter of law, in-custody interrogations to be inherently coercive. 384 US at 467. As a matter of Constitutional law this Court found confessions emanating from such inherently coercive interrogations to be violative of an accused's privilege against compulsory self-incrimination — unless accused was advised of and properly waived certain Constitutional rights. 384 US at 467. Unless one is minimally informed of those Constitutional rights which obtain at custodial interrogations and unless those rights are knowingly waived prior to interrogation, the coerciveness of the interrogational setting threatens the voluntariness of any confession.

"Gatehouse" interrogations continue to play a major role in law enforcement techniques. Cray, *Criminal Inter-*

rogations, *supra*. *Miranda* requirements serve to ameliorate the impact upon suspects of such interrogations and to assure that "Ours is the accusatorial as opposed to the inquisitorial system." *Watts v Indiana*, 388 US 49, 54; 68 S Ct 1347; 93 L Ed 1801 (1949). *Miranda* warnings thus represent a *minimum* effort on the part of our system of justice to shield suspects from coercive interrogations. The warnings have become fully ingrained upon the rubric of law enforcement functions and serve to impute a measure of integrity to "Gatehouse" interrogations. *Miranda* safeguards and encourages the exercise of individual Constitutional rights without significant deleterious effects upon law enforcement officials or the administration of justice. Abandonment of these safeguards would have no basis either in logic or precedent. *Miranda v Arizona* should be retained in its entirety.

### III. Federal Habeas Corpus is an appropriate forum for reviewing alleged violations of petitioner's Fifth Amendment Rights.

The California Attorney General's Office, in its Amicus Curiae in support of Petitioner, has alleged that Federal Habeas Corpus is not an appropriate method of reviewing *Miranda* violations occurring in state court criminal proceedings.<sup>1</sup> In view of the ramifications of such a contention, the extensive commentary and scholarly writing on the topic of the proper scope of Federal Habeas Corpus jurisdiction and this Court's discussion of the subject, per Justice Powell's concurring opinion in *Schneckloth v Bustamonte*, 36 L Ed 2d 854; 412 US 218; 93 S Ct 2041 (1973), a response to the California Attorney General's brief and a more thorough discussion of the contention should assist this court in its consideration of the issue.

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1 See Issue II. "Federal Habeas Corpus should not be permitted to Review Final State Court Criminal Convictions Based on Alleged Violations of *Miranda v Arizona*. 384 US 436, *supra*, or *Wong Sun v United States* (citation omitted)." pages 10-15

- A. Federal Habeas Corpus is an important vehicle in protecting the individual against intolerable Government illegality, and review of alleged *Miranda* violations occurring in State Proceedings is one effective way to insure that protection.

In his concurring opinion in *Schneckloth v Bustamonte*, 412 US 218; 36 L Ed 2d 854; 93 S Ct 2041 (1973), Justice Powell began his analysis of federal habeas corpus review with an historical review of the limits of common law habeas corpus. Stating that "much of the present perception of habeas corpus stems from a revisionist view of the historic function that the writ was meant to perform," *Schneckloth, supra*, at 877, and relying heavily on Professor Oaks' article,<sup>2</sup> Mr. Justice Powell demonstrated how several crucial opinions of the United States Supreme Court during the last quarter century were based in part upon incorrect historical assumptions regarding the writ. Recent scholarly writings certainly buttress Justice Powell's historical position.<sup>3</sup> Yet whether or not a justification for a broad scope of federal habeas corpus collateral review can be found in the common law is a question of minimal import to the discussion. Even Professor Oaks, whose article is heavily relied upon in Justice Powell's opinion, concedes that the scope of the English common law writ of habeas corpus should have little effect on a discussion regarding the proper purview of modern federal habeas jurisdiction.

"The purpose of the foregoing discussion is not to argue that the Supreme Court reached the wrong decision in *Townsend*. Its conclusion that a federal district court, when disposing of a habeas corpus applica-

2 Oaks, "Legal History in the High Court — Habeas Corpus" 61 Mich Law Rev 451 (1966).

3 See Oaks, *supra*. Footnote 3; "Developments in the Law: Federal Habeas Corpus" 83 Harvard L Rev 1038 (1970); Bater, "Finality in Criminal Law and Federal Habeas Corpus for State Prisoners," 76 Harvard L Rev 441 (1963).

*tion, has the power and sometimes the duty to hold a trial de novo on factual questions already determined in a state court may be a sound decision for our time.*

"The limited point urged here is that when the Court asserted that the 1867 act restored rather than extended the powers of the habeas judge, its assertion was plainly at variance with the facts of history." Oaks, "Legal History in the High Court — Habeas Corpus", 64 Mich Law Review 451, 457 (1966).

Indeed, the whole thrust of Professor Oaks' position, as well as that of other scholars discussing the relationship of modern federal habeas corpus jurisdiction to that of the common law, is simply to conclude that the use of habeas corpus as a post-conviction remedy is a relatively recent phenomenon should be examined in that context without "claiming support from a supposed showing that its conclusion really was dictated by — or at least that it restored — the durable content of the ancient law." Oaks, *supra* at 458.<sup>4</sup> This proposition applies to those who would limit, as well as those who wish to sustain the broad scope of federal habeas corpus review.

*The real issue then, is whether a review of the policy consideration at play justify such broad powers of review as now exist under federal habeas corpus.*

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4 The limitation of an "historical" approach to federal habeas corpus jurisdiction is illustrated by the fact that the often cited Habeas Corpus Act of 1679, passed by the English Parliament, *excluded* from its coverage persons who were confined as a result of a criminal conviction. This left criminal prisoners to resort to habeas corpus at "common law"! (See W. Church, *A Treatise on the Writ of Habeas Corpus*, 31 (2nd ed 1893); *Developments in the Law*, *supra*, Footnote 3, at 1044-1045). The common law writ of habeas corpus pertaining to criminal convictions in 1679 was developed by the close of the 1500's and called "*habeas corpus ad subjiciendum*." "*Developments in the Law*", *supra*, footnote 3 at 1043. Thus, a "common law" approach to the proper scope of habeas corpus in criminal cases would rest on either (a) the development of the Habeas Corpus Act of 1679 to the present, or, (b) the writ of *habeas corpus ad subjiciendum* as it was used in England during the 1500's and 1600's. Such an approach would be as unenlightening as it is absurd.

1. *Federal Habeas Corpus jurisdiction should not be limited to those cases presenting a "Colorable Claim of Innocence", since the principal function of Federal Habeas Corpus is to serve as a dispassionate review of Constitutional Claims, and not retry factual issues.*

It has been suggested recently that federal habeas corpus review might be limited only to petitions presenting colorable claims of innocence.<sup>5</sup> Indeed, this proposition is at the very core of Justice Powell's concurrence in *Schneckloth v Bustamonte*, *supra* at 890:

"Indeed, it is difficult to explain why a system of criminal justice deserves respect which allows repetitive reviews of convictions long since held to have been final at the end of the normal process of trial and appeal where the basis for re-examination is not even that the convicted defendant was innocent."

The Amicus Curiae Brief of the California Attorney General supports this concept as well, articulating as one of the reasons for a limitation on federal habeas review the fact that "[t]he guilt or innocence of the defendant or respondent is not in doubt." Though the latter quote is clearly an overstatement, and would be more correct if it stated that the guilt or innocence of a petitioner is *rarely in issue*, the proposition (especially as set out by Justice Powell) merits close scrutiny. It is interesting that in developing the proposition, none of the commentators (or for that matter Justice Powell) contends that the function of federal habeas review should be to *retry* the petitioner. Indeed, were this to be at the heart of the "colorable claim of right" theory, the solution would create more problems than it could solve. Were the function of federal habeas corpus to retry the petitioner, then the Federal government and the state's interest in finality of a conviction, the integrity of

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<sup>5</sup> See for example Friendly, "Is Innocence Irrelevant? Collateral Attack on Criminal Judgments," 38 U Chi L Rev 142 (1970).

the state court system and the effective utilization of limited judicial resources would be destroyed. Thus, though an initial reaction to the "colorable claim of innocence" theory may be that it would tend to further the state's interest in enforcement of substantive state criminal law, it would in the long run create an unjustifiable intrusion into the state's judicial power.

In fact it appears that the converse of Justice Powell's proposition appears true. Federal habeas corpus is a useful and necessary vehicle in the protection of a petitioner's constitutional rights *precisely because* it constitutes a dispassionate review of a state trial court's application of constitutional standards.

"[E]xpanded use of the writ is responsive to institutional need for a separate proceeding — *one insulated from inquiry into the guilt or innocence of the defendant and designed specifically to protect constitutional rights.* The momentum of the trial process and the trial judge's focus upon the central issue of the accused's guilt or innocence may tend to divert attention from ancillary questions relating to constitutional guarantees." "Developments in the Law — Federal Habeas Corpus." 83 Harvard L. Rev 1038, 1056 (1970).

In summary, the very strength of federal habeas corpus review may well be the fact that it functions one step removed from the question of guilt or innocence. It is not being asserted here that the federal courts are not interested in the facts of a criminal case on federal habeas review. *Rather, it is contended that the federal courts should be concerned with the factual setting only in reviewing whether the state court correctly applied the constitutional standard in issue to the facts.* It is this delicate differentiation between the trial court's function and the collateral function of federal habeas corpus review that is at once the strength of federal habeas review as well as the source of confusion. To intimate that the process should be intertwined with the function attributed to the finder of fact (i.e. guilt vs innocence) is to misunderstand the *institutional* structures involved. As suggested by several com-



mentators,<sup>6</sup> once a policy decision is made that a state criminal defendant is to be given the full benefit of the bill of rights through the 14th Amendment, then enforcement of those constitutional rights via a collateral federal proceeding need not affect the state's interest in enforcing its substantive criminal law any more than if the defendant's constitutional rights had been observed at trial.

**2. *Collateral Review of State Criminal Cases through Federal Habeas Corpus serves a necessary purpose which can best be understood by viewing the State and Federal Court Systems as fulfilling distinct institutional objectives.***

Given the conceptual, or institutional, distinctions made in the foregoing argument, it is apparent that one crucial question is left unanswered. That is, if "institutional" factors justify, if not require, a "dispassionate" review of state trial court proceedings, *why then should that review take place at the federal level, rather than via state collateral attack?* This issue is raised, somewhat tangentially, in the California Attorney General's amicus brief at page 13, where it is noted that:

"A repetition of hearings in Federal Courts in instances where a respondent has had a full and fair state hearing is a useless expenditure of judicial time, personnel, prosecutors and defense counsel. The encouraging of collateral attack frustrates the deterrent effect of the law and the effectiveness of rehabilitation. There is an undue subordination of state courts to lower federal courts with the resulting exacerbation of federal — state relationships and the doctrine of federalism is itself eroded."

The answer to such an attack lies within the concept set forth earlier regarding a difference in the "institutional

<sup>6</sup> See Schaefer, "Federalism and State Criminal Procedure," 70 Harv L Rev 1, 22 (1956); Developments in the Law, *supra*, footnote 3 at 1058-1059.

setting<sup>7</sup> of state courts and federal courts exercising habeas corpus jurisdiction. State courts will most likely be inclined, in passing upon issues of constitutional significance, to heavily reflect a penchant for punishing the guilty and ensuring that their constituency (if the judges are elected) is protected by the incarceration of the defendant. That is, the primary goal is the enforcement of the state's substantive criminal law. Thus, the state courts may tend to subordinate the individual's right to protection from improper state action to the goal of conviction.<sup>8</sup> The federal courts however, have a primary allegiance to the constitution and, *precisely because* they are removed from the proximity of the enforcement of state law they can effectively undertake an objective second look at the state's application of the constitution to the factual setting.

This point leads to a related consideration. The enforcement of constitutional principles via federal habeas review makes possible a more uniform application of those principles for all state criminal defendants. The United States Supreme Court's power to review constitutional issues directly from a decision by the state's highest forum is limited in practicality by the sheer number of cases decided in the fifty (50) states. Thus, federal habeas review may act as a buffer in alleviating the burden on the United States Supreme Court and ensuring a relatively coherent and consistent application of federal constitutional law.

Thirdly, the state's interest in promoting finality in criminal litigation (and presumably progressing with the individual's rehabilitation) is no answer to the question. Certainly costs cannot be used to justify any limitation on the individual's vindication, via collateral review, of a constitutional claim. We would do well to remember Justice Stone's oft quoted words:

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7 This phrase is introduced and used at length in "Developments in the Law", *supra*, footnote 3. For a fuller discussion of this concept, see pp. 1045-1063 of that article.

8. See Amsterdam, "Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Trial Court," 113 U Pa L Rev 793, (1965); and "Developments in this Law," *supra*, footnote 3 at 1060-1061.

"There are many rights and immunities secured by the constitution . . . which are not capable of money valuation . . ." *Hague v Cio*, 307 US 496, 529 (1939).

Yet in spite of such a universally accepted principle as that stated by Justice Stone, the problem of the administrative burden of federal habeas corpus applications and resulting costs continue to rear their heads when the subject of the scope of federal habeas jurisdiction is in issue.<sup>9</sup> However, aside from citing the raw statistical increase in the number of habeas corpus petitions filed in federal courts in recent years, few advocates of more limited habeas jurisdictions make any further evaluation of the problem. At least two recent studies tend to support a conclusion that federal habeas petitions *do not* constitute a severe financial and administrative burden. One such study undertook a detailed analysis of federal habeas corpus petitions filed in Massachusetts in fiscal years 1970, 1971 and 1972.<sup>10</sup> That study suggests that over half of the cases are easily disposed of in summary dismissals or dismissal for failure to exhaust state remedies.<sup>11</sup> Further, the use of magistrates has been one relatively effective and relatively economical way to deal with the remaining cases, though the author concedes the present system requires modification and improvement.<sup>12</sup>

A second study, buttresses the conclusion that the increase in habeas petitions has not resulted in an unmanageable burden on the federal district courts. Government statistics<sup>13</sup> were analyzed in a Harvard Law Review article, the conclusion most likely being a surprise to some:

"The result, of course, has been a vast increase in the number of habeas corpus petitions. In 1968, over

9 See Justice Powell's opinion in *Schneekloth*, supra, at 882; Friendly, supra, footnote 5; California Attorney General's Amicus Brief, at 13.

10 Shapiro, "Federal Habeas Corpus: A Study in Massachusetts" 83 Harv L Rev 321 (1973).

11 Ibid, pp 333-335, Table IV and Table A.

12 Ibid, pp 361-367.

13 Director of the Administrative Office of The United States Courts, Annual Report 130 (1968).

6,300 petitions were filed in federal district courts by state prisoners. This was an increase of 286 percent in just five years. *Yet it is all too easy to overstate the strain that an expanded habeas jurisdiction and expanded federal constitutional rights put on the judicial system. Most of the petitions were quickly dismissed: less than 500 reached the hearing stage, and most of those hearings lasted less than one day. Nor was the burden on the states staggering: many petitions do not even require a response; less than ten percent of the state convictions attacked had to be defended at a hearing, and so few prisoners were released that the burden of re-trial must be small.*" "Developments in the Law," footnote 3, *supra*, at 1041, (Emphasis added).

A fourth consideration often cited in support of limiting federal habeas corpus jurisdiction is the "friction" created by this concurrent jurisdiction, or, stated otherwise, the interest of the state courts in preserving their integrity and autonomy.<sup>14</sup> One answer to this point should be apparent from the foregoing discussion — that is that necessity for federal habeas review is the culmination of institutional rather than personal factors. Yet another answer is apparent, and that is that though "friction" between the institutions is potentially a problem,<sup>15</sup> the federal courts take pains to prevent it. The federal habeas statutes, and most importantly 28 U.S.C. §2254, contain a very effective mechanism which helps to enforce the state's interest in preserving its own judicial integrity and autonomy. It is clear that a federal court will not entertain a federal habeas petition unless "it appears that the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. §2254(b). This "remedy" of effectively remand-

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14 See *Schneekloth v. Bustamonte*, *supra*, opinion by Mr. Justice Powell at 881, 884, 890-891; Friendly, *supra*, footnote 5.

15 It is somewhat difficult to understand why proponents of this position do not also recognize that the same factors would appear to apply to direct review by the United States Supreme Court of State proceedings.

ing the cause to the state courts is consistently used and as suggested by one very recent study,<sup>16</sup> may be *the most common* method of disposing of federal habeas petitions, accounting for over fifty percent (50%) of all federal habeas dispositions in Massachusetts from 1970 to 1972. Therefore, it would appear that the federal courts not only respect the autonomy and integrity of the state judicial systems, but perhaps too often "remand" a case to the state courts without looking at it on its merits, in deference to state autonomy at the expense of the defendant.

Such extreme deference may well be ill founded. Although there may exist a presumption of regularity in state proceedings, Professor Reitz' study in 1960 of thirty-five (35) successful federal habeas corpus applications documented state court abuses in treatment of even the most meritorious cases.<sup>17</sup>

Such abuses, while not *necessarily* being a strong argument *per se* in opposition to the doctrine of state exhaustion, certainly constitute very persuasive authority for demonstrating the necessity of federal habeas corpus relief for state prisoners.

It appears that all of the objections to expanded federal habeas corpus review then, are not as strong as they appear at first glance. The state's interest in the enforcement of its substantive law, autonomy, and finality in the criminal process all are legitimate considerations. However, such considerations must be weighed in light of the (necessarily) different emphasis of interests regarding state court -vs- federal habeas corpus jurisdiction, the expansion of constitutional safeguards in the last quarter century, the need for a greater uniformity in the application of federal constitutional law in state criminal procedure, and the relatively minimal cost considerations and administrative inconvenience resulting from increased federal habeas corpus applications. When balanced, the state interests are not defeated, and, where subordinated, are done so

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<sup>16</sup> See Shapiro, *supra*, footnote 10 at 333-335.

<sup>17</sup> Reitz, "Federal Habeas Corpus: Postconviction Remedy for State Prisoners," 180 U Pa L Rev 461 (1960).

as a result of a proper balancing of different institutional positions of the state and federal courts.

In a most cogent statement, one commentator pointed out that "[m]uch of the objection to federal habeas may be, at bottom, simply disagreement with constitutional decisions that expend a criminal defendant's procedural rights."<sup>18</sup>

- B. Even if this Court should limit Federal Habeas Corpus review in relation to appeals based on Fourth Amendment exclusionary case as suggested by Justice Powell in *Schneckloth*, no such limitation should apply to review of *Miranda* issues since the same factors do not apply to Federal Collateral Review of Fifth Amendment Issues.

The California Attorney General, in his amicus brief, notes that Justice Powell has proposed that federal habeas corpus review be limited when issues raised focus on search and seizure questions. This statement is certainly a fair representation of Justice Powell's proposal in his concurring opinion in *Schneckloth v. Bustamonte*, *supra*, at 876-891. However, issue must be taken with the Attorney General's conclusion at page 11 that "The same reasoning is applicable to review of *Miranda* contentions . . ." Indeed, not only does the conclusion constitute a quantum jump in its reasoning, but it is a conclusion that the majority of the court rejected in *Schneckloth*. The opinion of the court, delivered by Mr. Justice Stewart, took care to point out:

"The considerations that informed the Court's holding in *Miranda* are simply inapplicable in the present [4th Amendment] case. In *Miranda* the court found that the techniques of police questioning and the nature of custodial surroundings produce an inherently coercive situation. The Court concluded that '[u]nless adequate protective devices are employed to dis-

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18 "Developments in the Law", *supra*, footnote 3 at 1042.

pel the compulsory inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice. [citations omitted]'” *Schneckloth, supra*, at 36 L Ed 2d 874.

The thrust of the *Schneckloth* opinion is that the question involved, i.e. “voluntariness” as applied to the Fourth Amendment Search situation, is “immeasurably far removed from ‘custodial interrogation.’” *Schneckloth, supra* at 865. While the Fourth Amendment is viewed as having a prophylactic effect in relation to the limits of state sanctioned police conduct, the Fifth Amendment goes to the very core of insuring the fairness of the defendant’s trial. For this reason, *the argument* (whether correct or not) that federal collateral review of Fourth Amendment claims serves no deterrent function<sup>19</sup> is *inapplicable* to the Fifth Amendment. As brought out by Mr. Justice Stewart, the protections of the *Fifth Amendment* go to the very *reliability of the truth — determining process and the fairness of the trial itself*, while

“[t]he protections of the Fourth Amendment are of a wholly different order, and have nothing whatever to do with promoting the fair ascertainment of truth at a criminal trial. Rather, as Mr. Justice Frankfurter’s opinion for the Court put it in *Wolf v Colorado*, 338 US 25, 27; 93 L Ed 1782; 69 S Ct 1359, the Fourth Amendment protects the ‘security of one’s privacy against intrusion by the police’” . . . *Schneckloth, supra* at 36 L Ed 2d 871.

Therefore, while the Fifth Amendment guarantees go to the very integrity of the fact finding process, and may well determine the fairness of the trial, the Fourth Amendment stands “as a protection of quite different constitutional values” rarely touching upon the fairness of a trial, but rather expressing “the concern of our society for the right of each individual to be let alone.” See *Tehan v United*

<sup>19</sup> See for example Mr. Justice Powell’s discussion of this point in *Schneckloth, supra*, at 887.

*States ex rel Schott*, 382 US 406, 416; 15 L Ed 2d 453; 86 S Ct 459.

In sum, the considerations which informed the court's holding in the [Fifth Amendment] *Miranda* decision were conceded to be "inapplicable" to the *Schneckloth* discussion of "voluntariness" and "consent" as applied to the *Fourth Amendment*. It follows that *those same considerations*, when used in support of limiting federal habeas corpus *Fourth Amendment* review are inapplicable to any limitation on Fifth Amendment collateral review.

### CONCLUSION

In light of the reasons set forth herein, amicus curiae respectfully request that the decision in this cause of the United States Court of Appeals, Sixth Circuit, be affirmed, and that the Respondent's conviction be reversed.

Respectfully submitted,

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1973

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No. 73-482

---

STATE OF MICHIGAN,  
Petitioner,

vs

THOMAS W. TUCKER,  
Respondent.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SIXTH CIRCUIT

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**BRIEF OF DETROIT BAR ASSOCIATION  
AS AMICUS CURIAE IN SUPPORT  
OF THE RESPONDENT**

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This brief is filed pursuant to Rule 42 of the Supreme Court Rules. Consent to file has been granted by the Office of the Prosecutor of Oakland County Michigan, counsel for the Petitioner, and by Kenneth M. Mogill, Esq., counsel for the Respondent. Letters of consent of both parties have been filed with the Clerk of the Court.

## INTEREST OF AMICUS CURIAE

The Detroit Bar Association is a private non-profit corporate association of attorneys with some 4,000 members.

The purposes for which the Association is formed as set forth in Article II of its Articles of Incorporation are as follows:

1. To maintain honor and dignity in the profession of law.
2. To increase its usefulness in promoting the due administration of justice.
3. To cultivate social intercourse among its members.

The Detroit Bar Association counts among its members the majority of attorneys practicing law in the City of Detroit.

The interest of *Amicus* in the case at bar stems from the importance of the issue involved, and the impact which the decision of this Court will have upon the criminal justice system.

## SUMMARY OF ARGUMENT

*Miranda v. Arizona*, 384 US 436 (1966) has not proved to be an impediment of any consequence to effective law and enforcement. Quite the contrary, in addition to the prophylaxis contemplated by this Court's decision, it has proven to have effectively served an educational purpose in sensitizing law enforcement officials to the constitutional rights of the subjects of their investigation, and in

so doing has tended to effectuate the basic principles upon which the decision was based. In addition to alleviating the inherent coercion of a custodial interrogation situation, the rule has deemphasized the role played by confessions in the prosecution of criminal offenses. This effect is in line with the traditional Anglo-American abhorrence of convicting an accused out of his own mouth, a principle fundamental to the underlying rationale of *Miranda*. This area of criminal procedure is not one which is subject to half measures, or less than strict rules and guidelines. It is ingenuous in the extreme to speak of "modifying" the strictures of *Miranda*. *Miranda* represents a continuing normative principle of juridical morality, and the value of the rule in the context of criminal jurisprudence is not only as a procedural precept, but also as an ethical imperative. This function cannot be denigrated, and must not be abandoned. This Court's commitment to the principles embodied in *Miranda* should not be retreated from, and the prophylactic rule of that decision should not be retreated from.

### ARGUMENT

With respect to the first question presented in the Writ of Certiorari, *amicus* concurs and urges upon the Court the arguments of law put forth by the respondent, but will not formally brief or argue that question.

*Amicus* will address itself herein only to the second question certified for review, and takes the position that *Miranda v. Arizona*, 384 US 436 (1966), represents a principle of continuing constitutional and practical validity, which should not be limited or abandoned by this Court.

It is submitted that the logic of *Miranda* is as compelling today as it was on the date of decision, some seven years

ago. Indeed, experience under *Miranda* not only demonstrates that the rule has not significantly impeded police work, but also points out the need for such a prophylactic principle in the first instance.

Studies conducted in large metropolitan areas such as Pittsburgh<sup>1</sup> and Denver<sup>2</sup> have shown that the *Miranda* rule has not significantly impaired the ability of law enforcement agencies to apprehend and convict the perpetrator of a criminal offense.

In Pittsburgh, for example, the study revealed that although only approximately two thirds as many suspects actually gave confessions after having been advised of their rights as did without *Miranda* warnings,<sup>3</sup> the conviction rate has decreased less than one half of one percent.<sup>4</sup>

Contrary to the predictions of the Nay-sayers, neither confessions nor, more importantly, convictions, have become impossible to obtain of persons duly advised of their constitutional rights. What is striking about the Pittsburgh survey, *amicus* submits, is not how few confessions have been obtained since the advice of rights has been required to be given, but rather, how many. While it has been suggested that the persistence and efficacy of police attempts to secure admissions through interrogation has not been af-

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<sup>1</sup> Note, *Miranda* in Pittsburgh, 29 U Pitt L Rev 1 (1967).

<sup>2</sup> *Laiken* Police Interrogation in Colorado, 47 Denver Law Journal 1 (1970).

<sup>3</sup> According to the above cited study, the police practice of attempting to obtain a confession in all cases did not change even with the requirement that suspects be informed of their rights to counsel and to remain silent. In the pre-Miranda era, 48.5% of the suspects gave confessions, while in the post-Miranda period, only 32.3% confessed. *Miranda* in Pittsburgh, *supra*, at 12.

<sup>4</sup> The pre-Miranda conviction rate was 66.8% while the post-Miranda conviction rate has been 66.4%. *Miranda* in Pittsburgh, *supra*, at 19.

fectured by *Miranda*,<sup>5</sup> *amicus* suggests that the more significant observation to be gleaned from these data is that confessional statements are either playing a less significant role in the obtaining of convictions than they used to, or, perhaps, confessions were never as crucial to effective police work as was represented.<sup>6</sup>

Law enforcement can, and has learned to, live with *Miranda*.<sup>7</sup> Yet focusing on the "workability" of the warn-

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<sup>5</sup> *Laiken, supra*, at 41.

<sup>6</sup> The Pittsburgh study disclosed that the police felt confessions to be necessary to secure convictions in about twenty percent of all cases. *Miranda* in Pittsburgh, *supra*, at 15. The inaccuracy of this perception is shown by the data compiled by the Pittsburgh study, showing that no marked drop in conviction rate attended the rather notable decrease in the number of confessions obtained. If confessions were really necessary to conviction in one fifth of all cases initiated by the police, any drop in the number of confessions should produce a coordinate drop one fifth as large in the conviction rate (assuming all other factors to be equal); this, however, has simply not been the case.

<sup>7</sup> A study conducted in Macon and Knoxville, Tennessee, provides some interesting data. Law enforcement officers who regularly work with, and under the strictures of, the *Miranda* warning requirements, were interviewed with respect to their perceptions of that decision's effect on law enforcement. While the officers interviewed generally felt that *Miranda* was an obstacle to effective police work, less than one third of the officers interviewed identified the rising crime rate as a product of court decisions. The nature of the "obstruction" posed by *Miranda*, however, as perceived by the officers, is instructive. The study concluded, in this regard:

They seemed to view the decision as a "stumbling block" to investigation—not so much because of any particular effect on the questioning process *per se*, but because, as one officer remarked, it required them "to go through the ritual and paper work and legal technicalities." They resented the alleged inconvenience and, to an even greater extent, they perceived a front implicit in the requirement of advising suspects prior to interrogation.

Stephens, Flanders and Conner, Law Enforcement and the Supreme Court: Police Perceptions of the *Miranda* Requirements, 39 Tennessee Law Review 407, 429 (1972).

ing requirement obscures the real question at issue; that is, the values which are served by the *Miranda* rule.

This Courts' decision in *Miranda* was premised upon a recognition that the custodial interrogation process is inherently coercive, coupled with the notion, fundamental to Anglo-American jurisprudence, that it is somehow unseemly, and improper in the context of our adversary system, to secure convictions out of an accused's own mouth. (The embodiment of this latter precept is, of course, the central meaning of the Fifth Amendment privilege against self-incrimination.) No rule of law can equalize the position of interrogator and accused.<sup>8</sup> The *Miranda* requirements, however, are designed, it appears, to directly affect this relationship by (1) sensitizing the interrogator to the rights of the accused and (2) increasing the ability of the accused to assert his rights in the context of the interrogation relationship.

The rights of the accused are not subject to question. They are embodied, after all, in the constitutional provisions which *Miranda* was designed to effectuate. Neither

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<sup>8</sup> In this connection, the Courts' attention is drawn to the conclusions of several studies aimed at determining the effect which *Miranda* has had upon the interrogator-accused relationship, and the perceptions of criminal defendants of the criminal justice system. It appears, first, that the relative lack of powerlessness which most suspects feel the setting of police investigation has not been significantly altered by the requirement that the police advise them of their constitutional rights. Thus, for most persons, accused of crime, the effective ability to assert those rights in the context of what is essentially an adversary relationship with law enforcement authorities has no been significantly increased. Moreover, the overall perception of the criminal justice system of most criminal defendants (particularly members of minority groups) particularly in regard to their ability to effect the course of enforcement efforts for their own position vis a vis law enforcement activities, has not been significantly altered. *Laiken, supra*, at 21; Bell, *Racism in American Courts: Cause for Black Disruption or Despair?* 61 California Law Review 165, 185 (1973).



can it be seriously argued that we do not want citizens to assert these rights. To so argue, of course, would be to suggest that the operative constitutional commands should be ignored. Yet this argument, or suggestion, seems to be the underlying, unspoken assumption of those who oppose the continuing viability of *Miranda*. This basically subversive position must be rejected by this Court.

*Miranda* was, after all aimed at enhancing and protecting the integrity of the fact-finding process, and at safeguarding the primacy of the State's interest in a fair criminal trial. The centrality of the interests represented by *Miranda* has recently been recognized and reaffirmed by this Court in *Schneekloth v. Bustamonte*, —U.S.—36 L Ed 2d 854 (1973), in declining to extend the warning requirement in effectuation of the "less central" protections of the Fourth Amendment. The Court there set out what is perhaps the central teaching of *Miranda*:

That counsel is present when statements are taken from an individual during interrogation obviously enhances the integrity of the fact finding process in Court. The presence of an attorney and the warnings delivered to the individual, enable the defendant under otherwise compelling circumstances to tell his story without fear, effectively, and in a way that eliminates the evils in the interrogation process. Without the protections flowing from adequate warnings and the rights of counsel, "all the careful safeguards erected around the giving of testimony, whether by an accused or any other witness, would become empty formalities in a procedure where the most compelling possible evi-

dence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police." [384 US] at 466, 16 L Ed 2d 694, 10 ALR 3rd 974

Set out in *Schneekloth v. Bustamonte*, *supra*, —US—, 36 L Ed 2d at 870.

The psychological correctness of the underlying precept of *Miranda*, that coercion is inherent in even ethical interrogations, has been completely validated not only by the literature of social psychology, but also by those studies and reviews of the subject which have been conducted since that decision.<sup>9</sup>

\* Whether or not *Miranda* has altered the perceptions of criminal defendants with respect to the power of police, it has certainly had a salutary effect in regard to educating the police themselves to the significance of the Fifth Amendment guarantee. For one thing, the studies seem to suggest that police officers, operating under *Miranda*, have come to downgrade the importance of confessions in effective police work.<sup>10</sup> The notion that the criminal laws can be adequately enforced without the necessity of securing evidence of guilt from the accused himself is certainly in line with the policies embodied by the Fifth Amendment privilege against self-incrimination.

Moreover, the studies point up that regardless of the police estimate of the *Miranda* decision, the warnings re-

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<sup>9</sup> See, e.g., Ellis, A Comment on the Testimonial Privilege of the Fifth Amendment, 55 Iowa Law Review 829 (1970); Foster, Confessions and the Station House Syndrome, 18 DePaul Law Review 683 (1969).

<sup>10</sup> Stephens, Flanders and Conner, *supra*; see also, Note, Interrogations in New Haven: Impact of *Miranda*, 76 Yale Law Journal 1519 (1967).

quirement has produced in law enforcement officers at least a rudimentary knowledge of and respect for the Fifth Amendment guarantees.<sup>11</sup> This educational value should not be lightly taken, as the recognition of fundamental rights is an indispensable prerequisite to ensuring that those rights are respected by those in whose hands they are most easily abused.

Not without significance, too, is the observation that *Miranda* represents a significant effort to elevate the morality of the criminal law. That it is the responsibility of the courts to ensure evenhandedness and propriety in the day to day street-level application of the law can hardly be questioned. Nor can the proposition that the greatest measure of fairness is appropriate to the administration of the criminal justice system. As a moral imperative, *Miranda* may be seen as an embodiment of the following precept:

The administration of justice must attain the highest standard of fairness, indeed, of basic decency. In a government of law, the administration of that law is the measure of the society.<sup>12</sup>

Indeed, those who urge the abandonment of *Miranda* as an unaffordable procedural nicety would require this Court to disregard this normative precept, and to accept instead the proposition that it is acceptable to take advantage of an accused's ignorance in the name of combatting crime. *Amicus* contends that this nation had not reached the state of moral decay where this Court can conclude that the formalities of warning and advice can only be tolerated at the arraignment and preliminary hearing stage so long as

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<sup>11</sup> See, e.g., Stephens, Flanders and Conner, *supra*.

<sup>12</sup> Cray, Criminal Interrogation and Confessions: The Ethical Imperative, 1968 Wisconsin Law Review 173, 174 (1968).

we allow the police an opportunity to render them meaningless by obtaining a confession absent the assurances provided by the giving of warnings.

Through long and hard endeavor, through experiment and experiential validation, and a refusal to sacrifice principle for expediency, this Court has sought to erect a panoply of basic freedoms about the criminal accused. Petitioner urges upon this Court, in the name of expediency, and in the face of empirically derived intelligence to the contrary, the suggestion that a major portion of these protections be done away with. There is simply no way in which the values to be served in this area can be adequately protected by half measures. The Court must be guided by what it has so recently characterized as the "classic admonition" of *Boyd v. U.S.* 116 US 616, 635 (1913) (*Schneckloth v. Bustamonte, Supra*, —US—, 36 L Ed 2d at 863):

It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedures. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their effacacy, and leads to gradual depreciation of the right, as if it constituted more in sound than in substance. It is the duty of courts to be watchful for constitutional rights of the citizen, and against any stealthy encroachments thereon.

This Court should reject the facile argument that the goals of *Miranda* can be achieved even while "modifying"

the requirements therein enunciated. *Miranda* was based upon the recognition that, in this fragile area of liberty, nothing less than an absolute rule would serve to protect the constitutional values involved. Subsequent experience has not shown this assumption to have been mistaken. Neither has this experience shown the costs of the absolute protection to have been of crippling magnitude. Indeed, such reliable evidence as we have indicates that *Miranda* has been no deterrent to competent law enforcement.<sup>13</sup> Moreover, given the basic commitment to the adversary model, and the intelligence gleaned from the behavioral sciences regarding the inherent unreliability of extra-judicial confessions, and the illusory nature of "voluntariness" in a custodial interrogation setting, *amicus* submits that the "price" which we pay for the prophylaxis insured by the *Miranda* rule is small indeed in relation to the magnitude of the values which we seek to protect.

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<sup>13</sup> See authorities cited above, and, in summary, ALI Model Code of Pre-Arrest Procedure 101-49 (Study Draft No. 1, 1968).

## CONCLUSION

The rule enunciated by this Court in *Miranda v. Arizona*, 384 US 436 (1966) is a sound one, which has its roots not only in the fundamental precepts of our Anglo-American jurisprudence, but also in the most informed current intelligence regarding human behavior. The social costs attendant upon its enforcement are, at most, negligible. It has served an important and continuing purpose in actualizing fundamental constitutional guarantees at the most meaningful level—Citizen Interaction with Law Enforcement Officials and it represents a continuing social commitment to the fundamental precepts of our system of ordered liberty. To “modify” the rule is to abandon it, and to abandon the rule is to take a giant step backward in the development of a human and realistic criminal jurisprudence.

The holding of this Court in *Miranda v. Arizona*, *supra* must remain inviolate.

Respectfully submitted,

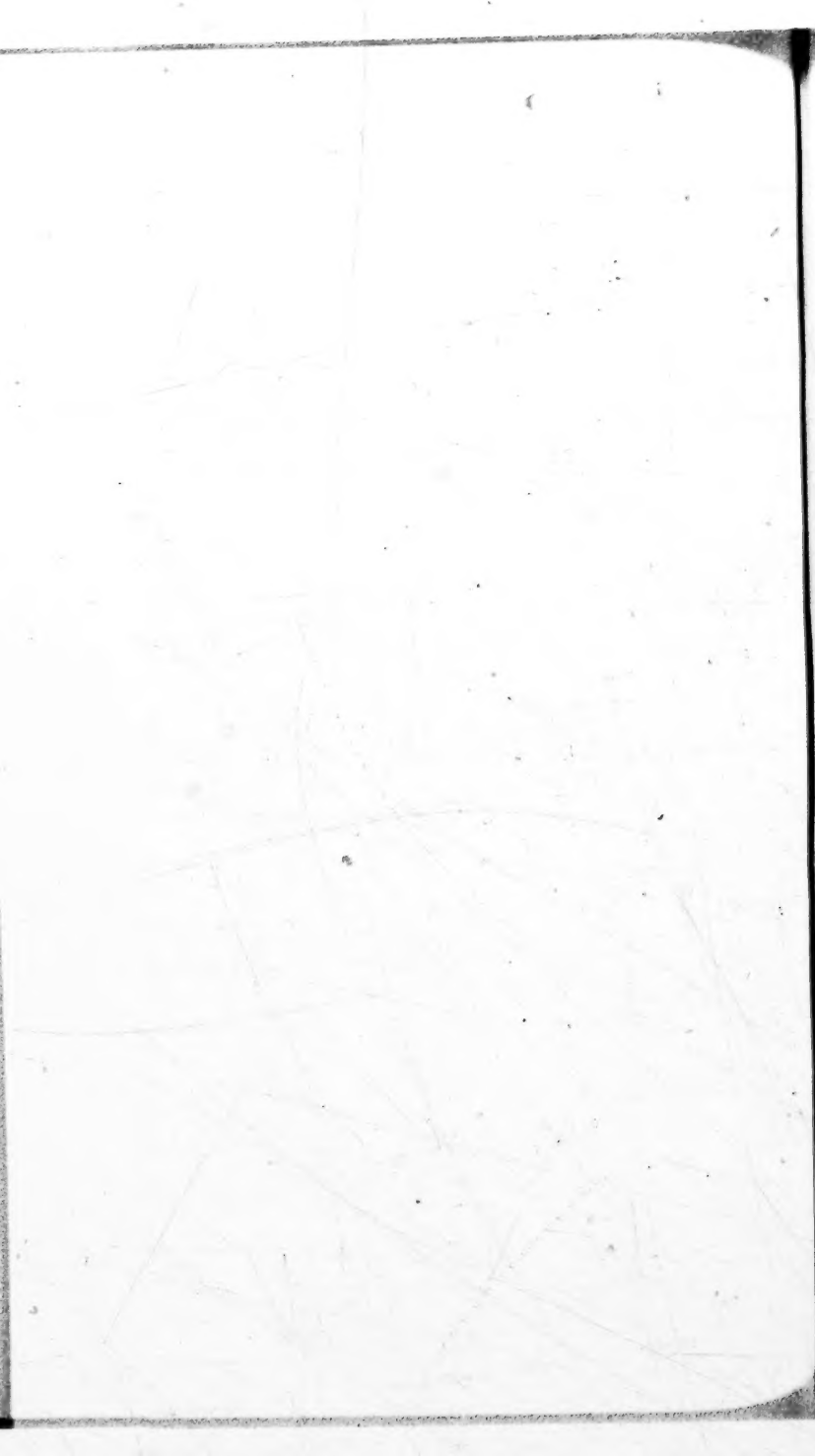
DETROIT BAR ASSOCIATION

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FEB 21 1974

IN THE

MICHAEL RODAK, JR., CL

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

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No. 73-482

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STATE OF MICHIGAN,

*Petitioner,*

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*Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SIXTH CIRCUIT

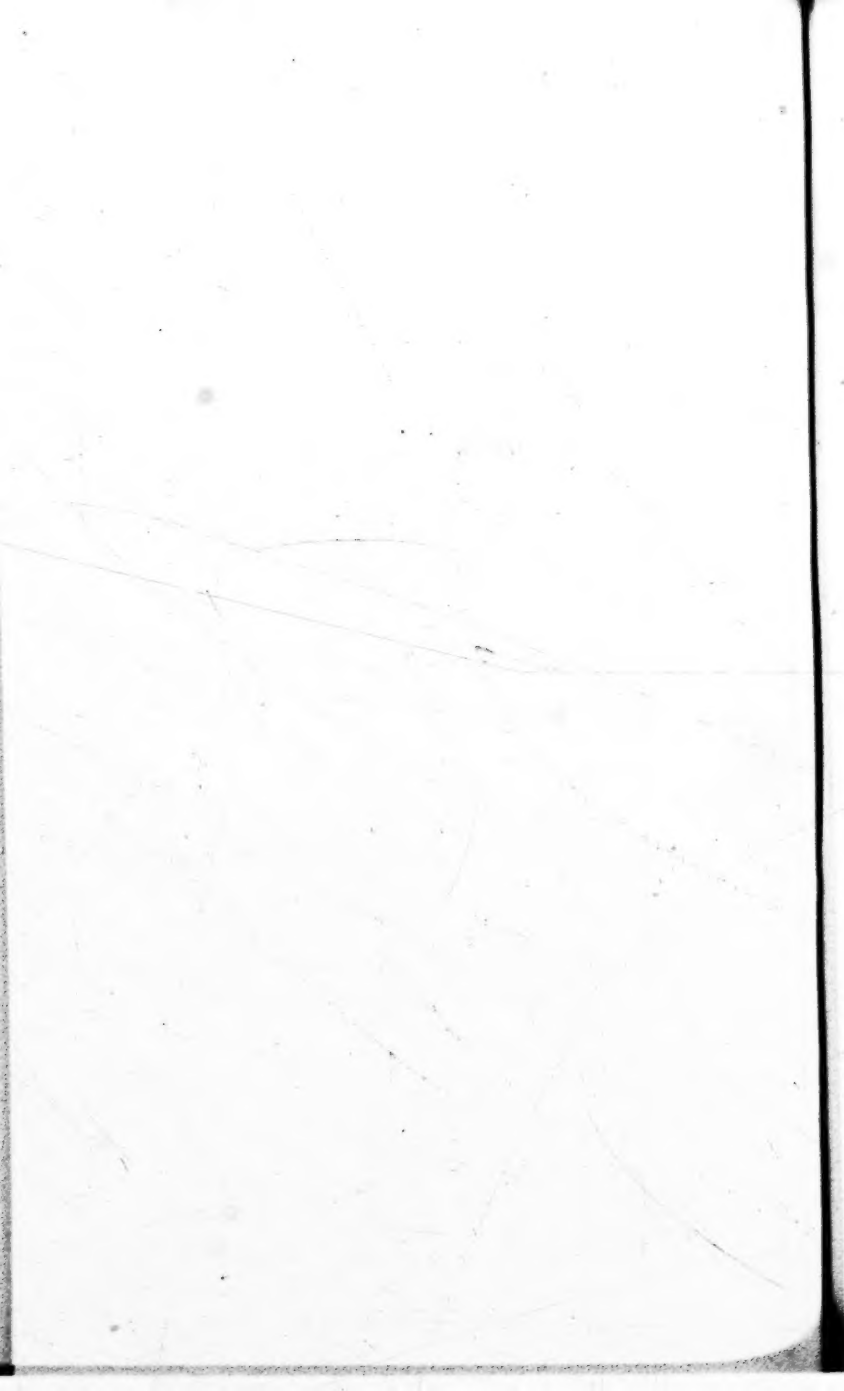
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BRIEF OF RESPONDENT

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IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

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No. 73-482

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STATE OF MICHIGAN,

v.

*Petitioner,*

THOMAS W. TUCKER,

*Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SIXTH CIRCUIT

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BRIEF OF RESPONDENT

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COUNTER-STATEMENT OF  
QUESTIONS PRESENTED

I. The decision in *Johnson v New Jersey* should not be overruled.

II. Where the existence and identity of a witness is learned solely as a direct result of admitted police illegality, and where it is stipulated that no independent source exists for the discovery of the witness' identity, the testimony of that witness must be suppressed.

III. Abandonment or modification of *Miranda* would not benefit law enforcement, would disrupt the administration of justice, would return this Court to the due process test it found incapable of administration, and would seriously weaken the Fifth Amendment privilege.

## COUNTER-STATEMENT OF THE CASE

1. *Facts involved in the dispute.* On April 19, 1966, Marion J. Corey, a 43 year old single resident of Pontiac Township, Michigan, failed to report for work at the National Twist Drill Company in nearby Rochester. A co-worker, neighbor and friend, Luther E. White, telephoned Ms. Corey's home to inquire after her and, receiving no answer by phone, went to her home. There he testified that he found Ms. Corey bound and gagged, bloody and apparently brutally beaten. She was partially disrobed and incoherent, and the house was in a blood spattered disarray.

Neither at that time nor later could Ms. Corey recall what happened to her, and at no time has she ever identified Mr. Tucker or anyone else as her assailant.

At the time Mr. White arrived at Ms. Corey's home there was a dog present in the home, although to his recollection Ms. Corey owned no dog. The dog at some point left the house. A dog which he thought to be the same one was later spotted by White, now with an Oakland County Deputy Sheriff, and this animal was followed by the deputy on a zig-zag course to a home about 900 feet away from Ms. Corey's house where it sat down in the front yard.

From a neighbor the deputy learned that Mr. Tucker and his parents lived in this home, that the dog seen running outside belonged to them and that Mr. Tucker drove a red 1959 Ford.

At about noon this information was telephoned to the Oakland County Sheriff's Department.

At about 4:00 p.m. that day Officer Charles Lindberg of the Pontiac Police Department telephoned an unknown person at the Oakland County Sheriff's Department and learned of the crime and that a named suspect was driving a red 1959 Ford. He was not given a description of the suspect.

At about 9:00 p.m. that evening Officer Lindberg saw a red 1959 Ford leaving Pontiac and entering Pontiac Township. There was no traffic violation observed. Nevertheless, the policeman pulled the vehicle over and demanded to see the driver's operator's license. The driver was Mr. Tucker.

Mr. Tucker was arrested and taken to the Oakland County Sheriff's Department where scratches were observed on his face and blood on his clothes. He was questioned and stripped in the course of which additional blood was observed on his underclothing.

Under interrogation Mr. Tucker stated that during the general time period of the alleged offense, he had been with one Robert Henderson, and that thereafter he had been at his home, alone and asleep in bed.

The parties to the proceedings in state court agreed by stipulation of July 14, 1967 (Appendix, p 29), that the identity and whereabouts of Robert Henderson and his connection with this matter were learned about *only* through the above mentioned interrogation of Mr. Tucker and that prior to the interrogation Mr. Tucker was not advised that he had a right to a court-appointed attorney if he was too poor to afford his own counsel. (Throughout the proceedings in state court and in the lower federal courts Mr. Tucker was represented by court appointed counsel, as he is in this action.)

When contacted by police, Henderson stated that Tucker was not with him during the time claimed and that the scratches on his (Tucker's) face were not from a goose that the two had shot since Tucker already had those scratches upon arrival at Henderson's house. Henderson further stated that Tucker had told him that he had had a fight with a "wild one", a "widow woman" who lived nearby.

The existence of the scratches on Tucker's face was corroborated by his work foreman to whom he had allegedly said that they were from the flailing of a goose.

At least six police officers examined Ms. Corey's home for evidence. Fingernail scrapings were taken from Ms. Corey, and an identification technician with the Oakland County Sheriff's Department photographed the scene and collected evidence for scientific testing by the Michigan State Police Crime Laboratory. This evidence was turned over to Detective Kennard Christenson of the Michigan State Police Scientific Detection Laboratory in Lansing. Further, Mr. Tucker's clothing was taken from him at the Oakland County Jail on the evening of his arrest and submitted for scientific examination.

Out of this entire investigation, there was no scientific or eyewitness testimony produced at trial placing Mr. Tucker at Ms. Corey's home. There was no testimony of Mr. Tucker's fingerprints or palm prints having been found anywhere on the premises. Ms. Corey did not identify Mr. Tucker or anyone else as her assailant, and if there were any eyewitnesses they were not located or called to testify at the trial. Moreover, there was no testimony that the blood found on Mr. Tucker's clothes, which was human blood, was Ms. Corey's blood or even the same blood type as Ms. Corey.

2. *State and federal Court proceedings.* Mr. Tucker's first trial ended in a mistrial. At his second trial he was convicted of rape, and on November 9, 1966, he was sentenced to 20-40 years imprisonment. Timely Motion for New Trial was denied January 10, 1968. Petitioner's conviction was affirmed by the Michigan Court of Appeals on October 1, 1969 [*People v Tucker*, 19 Mich App 320, 172 NW2d 712 (1969)], and by the Michigan Supreme Court on August 27, 1971 [*People v Tucker*, 383 Mich 594, 189 NW2d 290 (1971)].

Mr. Tucker's Petition and Brief for Writ of Habeas Corpus, along with Motion to Proceed *in Forma Pauperis* and Affidavit of Indigency, were filed in the United States District Court for the Eastern District of Michigan, Southern Division, on December 15, 1971.

On December 22, 1972, the District Judge's Opinion and Order Granting the Petition for Writ of Habeas Corpus was entered. That decision is reported as *Tucker v Johnson*, 352 F Supp 266 (ED Mich 1972).

On June 21, 1973, the Sixth Circuit affirmed the decision of the District Court without opinion. 480 F2d 927 (6th Cir 1973).

On December 3, 1973, this Court granted certiorari.

US \_\_\_, \_\_\_ S Ct \_\_\_, 38 L Ed 2d 467.

This is the Brief of Respondent.

### SUMMARY OF ARGUMENT

1. Reconsideration of the rule of *Johnson v New Jersey* at this time would have no appreciable impact whatever on the administration of justice. Prior decisions should not be disturbed except in cases of clear error. The rule of *stare decisis* is particularly important in cases "which affect retroactively the jurisdiction of courts." *Marshall v Baltimore & Ohio R Co.*, *infra*. *Johnson v New Jersey* should not be reconsidered or overruled.

2. Issue II presents the narrow question of whether, given the existence of an admitted violation of a suspect's constitutional rights, an admitted direct link between an inadmissible statement and the discovery of a witness, and an admitted lack of independent source for the discovery of that witness, there is any precedential, logical or policy basis for creating a distinction between physical and verbal evidence. This Court expressly rejected such a distinction in *Wong Sun*.

Protection of the Fifth Amendment privilege requires excluding all evidence derived from an invalid waiver thereof, including leads and names of witnesses. cf. *Kastigar v United States*, *infra*.

*United States v Calandra*, *infra*, does not detract from this rule, for the question in that case did not bear on whether there exists a basis for distinguishing between types of derivative evidence.



There is no logical basis for distinguishing between physical and verbal evidence. Such a distinction is inconsistent with *Wong Sun*. It ignores the test for administration of the exclusionary rule—the relationship between the primary illegality and the discovery of the evidence. Voluntariness of the witness' testimony is irrelevant since a witness may be compelled to appear in court by subpoena. There is no distinction between physical and verbal evidence in terms of deterrence. The test would produce anomalous results. An officer able to utilize direct, verbal fruits of an unlawful statement would be encouraged to obtain unlawful statements.

There is no distinction between physical and verbal evidence on the ground that physical evidence speaks for itself or that a witness is subject to cross-examination. Just as a search may not be justified on the basis of what it produces, the nature of the evidence here is irrelevant in determining its admissibility. Physical evidence is subject to cross-examination-type scrutiny much the same as verbal evidence by examination of the experts or by independent testing.

Policy also dictates rejection of the proposed distinction. Cases which have attempted to determine the admissibility of verbal evidence on the willingness of the witness to testify have been completely contradictory in their reasoning. There is no logical basis for choosing among any of the "willingness" tests which have been applied. Such a test attempts to draw definite conclusions from ambiguous acts. It is a type of test traditionally disfavored in the law. It would, ultimately, have the admissibility of evidence turn on a witness' feelings towards the courts, police, the victim and the accused.

The proposed distinction would defeat the Fifth Amendment privilege. It should be rejected.

3. Issue III is not whether *Miranda v Arizona* should have been decided. Rather, given the decision in *Miranda*,



has the administration of justice been so severely hampered thereby as to justify departure from *stare decisis*. There has been no showing that *Miranda* has harmed the administration of justice. The available evidence indicates that *Miranda* has not harmed law enforcement or the administration of justice.

Abandonment or modification of *Miranda* would not help stop crime. It would create administrative problems and would effectively sanction the abuses this Court was unable to resolve without *Miranda*. It would create uncertainty in the law and cast the courts in an unfavorable public light.

The rule in *Miranda v Arizona* is necessary because prior decisions of this Court were incapable of protecting the privilege from unknowing and involuntary loss. The due process test of voluntariness was "illusory". It was not followed regularly by lower courts, prosecutors or police.

*Miranda* has provided an opportunity for effective exercise of the privilege. It has provided an administrable standard. It is also a guide to police. Compliance is a simple matter.

An "inadvertence" test, like good faith, is irrelevant. An "egregiousness" test would, in effect, be the due process test. Abandonment or modification of *Miranda* would seriously weaken the Fifth Amendment privilege.

*Miranda* should be adhered to in its entirety.

## ARGUMENT

### I.

#### THE DECISION IN *JOHNSON v NEW JERSEY* SHOULD NOT BE OVERRULED.

*Johnson v New Jersey*, 384 US 719, 86 S Ct 1772, 16 L Ed 2d 882 (1966), applies the standards of *Miranda v Arizona*, 384 US 436, 86 S Ct 1602, 16 L Ed2d 694 (1966), to those cases in which custodial statements

taken prior to the decision in *Miranda* were first offered into evidence at trials commencing after the date of decision in *Miranda*. Reconsideration of this rule at this time would have no appreciable impact whatever on the administration of criminal justice in this country, and Petitioner has offered no reasons justifying overruling the decision.<sup>1</sup>

Adherence to prior decisions is a paramount principle in the law, and only in cases of the clearest error will a court set aside its own prior judgment:

It is almost as important that the law should be settled permanently, as that it should be settled correctly. Its rules should be fixed deliberately and adhered to firmly, unless clearly erroneous. Vacillation is a serious evil. *Gilman v Philadelphia*, 3 Wall 713, 724, 18 L Ed 96, 99 (1866).

This principle is particularly important where the case sought to be overruled is a recent one, cf. *Goodtitle ex dem. Pollard v Kibbe*, 9 How 471, 478, 13 L Ed 220, 223 (1850), and of even greater importance where the principle at issue involves retroactivity. As stated by Mr. Justice Grier in *Marshall v Baltimore & Ohio R Co.*, 16 How 314, 325, 14 L Ed 953, 958 (1853):

There are no cases where adherence to the maxim of "stare decisis" is so absolutely necessary to the peace of society, as those which affect retroactively the jurisdiction of courts.

*Johnson v New Jersey* should not be reconsidered or overruled.

<sup>1</sup> Petitioner should be foreclosed from arguing this question in this Court, as it was not raised in his Petition for Writ of Certiorari. Rules of the Supreme Court, Rule 40(1)(d)(2).

## II.

WHERE THE EXISTENCE AND IDENTITY OF A WITNESS IS LEARNED SOLELY AS A DIRECT RESULT OF ADMITTED POLICE ILLEGALITY, AND WHERE IT IS STIPULATED THAT NO INDEPENDENT SOURCE EXISTS FOR THE DISCOVERY OF THE WITNESS' IDENTITY, THE TESTIMONY OF THAT WITNESS MUST BE SUPPRESSED.

## A.

After being arrested,<sup>2</sup> Mr. Tucker was taken to the Oakland County Sheriff's Department where he was interrogated by Detective Anderson. Without being warned of his right to court-appointed counsel, Mr. Tucker, an indigent, stated that during the general time period of the alleged offense he had been at his home, alone and asleep in bed. Subsequently officers contacted Henderson, who contradicted Mr. Tucker's story and attributed to him an admission to this offense.

Because of the applicable *Miranda* violation, *Johnson v New Jersey, supra*, Mr. Tucker's statement was suppressed. Henderson's testimony, obtained as a direct result of Mr. Tucker's statement, was nevertheless presented at trial as part of the State's case-in-chief.

By stipulation of July 14, 1967, the parties to the proceedings in state court agreed that the identity and whereabouts of Henderson and his connection with this case were learned about *only* through the above-mentioned interrogation of Mr. Tucker and that prior to the interrogation Mr. Tucker was not advised of his right to court-appointed counsel if too poor to afford his own.<sup>3</sup> At no time has the state claimed that there was an

<sup>2</sup> Throughout the proceedings below respondent has challenged the legality of his initial arrest. As neither the District Court nor the Court of Appeals has ruled on this question, it is not pursued here.

<sup>3</sup> Throughout the proceedings in the state and federal courts, Mr. Tucker has been represented by court-appointed counsel, as he is in this Court.

independent source for Henderson's discovery or denied that Mr. Tucker's statement led directly to the discovery of Henderson.

## B.

This case presents the narrow question of whether, given the existence of an admitted violation of a suspect's constitutional rights, an admitted direct link between an inadmissible statement and the discovery of a witness, and an admitted lack of independent source for the discovery of that witness, there is any precedential, logical or policy basis for creating a distinction between physical and verbal evidence and refusing to suppress the witness' testimony from use in the State's case-in-chief under circumstances where physical evidence would have been excluded.<sup>4</sup> For the reasons set forth below, respondent submits that there is not.

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<sup>4</sup>The evidence found by the Court of Appeals to have been erroneously admitted in this case meets all of the limitations of the exclusionary rule. In summary, these limitations provide that evidence is to be suppressed only where the evidence was directly produced by illegal activity, the illegality was the action of the state, the accused has standing to object, and the connection is not so remote as to dissipate the taint.

Moreover, the state may still introduce the evidence if it is able to demonstrate an independent source for its discovery and, regardless of any error in the discovery of the evidence or lack of independent source, the evidence may still be used before a grand jury, *United States v Calandra*, \_\_\_ US \_\_\_, \_\_\_ S Ct \_\_\_, \_\_\_ L Ed2d \_\_\_, 14 Cr L 3061 (1974), or to prevent perjury in the case of an accused who testifies falsely. *Harris v. New York*, 401 US 222, 91 S Ct 643, 28 L Ed2d 1 (1971). Finally, except where the illegally obtained evidence is an accused's statement, *Payne v Arkansas*, 356 US 560, 561, 78 S Ct 844, 2 L Ed2d 975, 977 (1958), even where evidence is improperly admitted, an accused is not entitled to a redetermination of innocence or guilt where the introduction of the evidence was harmless beyond a reasonable doubt. *Chapman v California*, 386 US 18, 17 S Ct 824, 17 L Ed2d 705 (1967).

While this Court has never passed on the precise fact question presented herein, *cf. Harrison v United States*, 392 US 219, 223, 88 S Ct 2008, 20 L Ed2d 1047, 1052 (1968) at n 9, this Court has never sanctioned a distinction such as is proposed by the Petitioner and has in fact expressly rejected it in circumstances closely similar to those of the case at bar. *Wong Sun v United States*, 371 US 471, 485-486, 83 S Ct 407, 9 L Ed2d 441, 454 (1963). Moreover, such a distinction is unsound logically and as a matter of jurisprudential policy.

The primary principle involved in this case, the so-called fruit of the poisonous tree doctrine, has been articulated in three prior decisions of this Court, *Wong Sun v United States*, *supra*, *Nardone v United States*, 308 US 388, 60 S Ct 266, 84 L Ed 307 (1939), and *Silverthorne Lumber Co. v United States*, 251 US 385, 40 S Ct 182, 64 L Ed 319 (1920). Additionally, the scope of exclusion necessary was discussed in *Alderman v United States*, 394 US 165, 89 S Ct 961, 22 L Ed2d 176 (1969), and the protection needed to safeguard the Fifth Amendment privilege was recently considered in *Kastigar v United States*, 406 US 441, 92 S Ct 1653, 32 L Ed2d 212 (1972). These and related cases hold that the government may gain no evidentiary advantage from its illegal activities, *Silverthorne*, *supra*, 251 US at 391-392, 64 L Ed at 321, and that the courts must prevent full indirect use, *Nardone*, *supra*, 308 US at 340, 84 L Ed at 311; *Kastigar*, *supra*, 406 US at 453, 32 L Ed2d at 222, of all evidence illegally obtained, anything of evidentiary value, *Davis v Mississippi*, 394 US 721, 724, 81 S Ct 1394, 22 L Ed2d 676, 679 (1969), regardless of the physical or verbal nature of that evidence. See also *Miranda*, *supra*, 384 US at 479, 16 L Ed2d at 726.<sup>5</sup>

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<sup>5</sup> *United States v Calandra*, *supra*, does not weaken the application of this rule in the circumstances of this case. The issue in *Calandra* was whether to permit the use of illegally seized evidence and its fruits before a grand jury and not, as in the case at

Mr. Justice Holmes first articulated the poison fruit rule for the Court in *Silverthorne*.<sup>6</sup> In that case the government illegally seized corporate books and documents of the petitioner. Obligated to return these items, the government did so, but only after taking photographs which it used to subpoena the petitioner *duces tecum* to produce the originals before the grand jury. The petitioner refused to comply and was cited for contempt. Reversing the contempt, Justice Holmes addressed himself first to the position of the government in stating the holding of the Court:

The proposition could not be presented more nakedly . . . that the protection of the Constitution covers the physical possession, but not any advantages that the government can gain over the object of its pursuit by doing the forbidden act . . . In our opinion such is not the law. It reduces the Fourth Amendment to a form of words. The essence of a provision forbidding the acquisition of evidence in a

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bar, whether there exists a basis for distinguishing between various types of derivative evidence in circumstances where it has already been determined that illegally seized evidence and its fruits must be suppressed. Because of the historical role and function of the grand jury, the difficulty of administering such a rule, the possible impact of such a rule on the efficacy of the grand jury's functioning and a perceived lack of deterrent effect, the Court decided against suppression in *Calandra*. None of those considerations are present in this case.

<sup>6</sup>While *Silverthorne* was a Fourth Amendment case, the same considerations govern the scope of the exclusionary rule regardless of the source of the violation, for once the primary taint is established, the question becomes one of the relationship between the violation and the evidence, *Wong Sun*, *supra*, 371 US at 488, 9 L Ed2d at 455, measured in light of the purposes of the provision which has been violated. See generally, Ruffin, "Out on a Limb of the Poisonous Tree: The Tainted Witness", 15 UCLA L Rev 36 (1967); Note, "The Supreme Court, 1967 Term," 82 Harv L Rev 63, 221-222 (1968).

certain way is that not merely evidence so acquired shall not be used before the court but that it shall not be used at all. *Id.*, 251 US at 391-392, 64 L Ed at 321.

In *Nardone*, the Court reversed a Court of Appeals ruling that the petitioner may not challenge prosecution evidence as being derived from evidence which the Court in the first *Nardone* decision, 302 US 379, 58 S Ct 275, 82 L Ed 314 (1937), had ruled unlawfully obtained.<sup>7</sup> In his opinion for the Court, Mr. Justice Frankfurter reiterated the "independent source" limitation previously stated by Justice Holmes in *Silverthorne*, 251 US at 392, 64 L Ed at 321, and spoke to the practical application of the rule. He emphasized that "full indirect use" of illegally seized evidence must be prohibited for the rule to have meaning, while noting that as the connection grows more tenuous the taint becomes "dissipated":

[The first *Nardone*] decision was the translation into practicality of broad considerations of morality and public well-being. This Court found that the logically relevant proof which Congress had outlawed, it had outlawed because "inconsistent with ethical standards and destructive of personal liberty" . . . (cite omitted). *To forbid the direct use of methods thus characterized but to put no curb on their full indirect use would only invite the very methods deemed "inconsistent with ethical standards and destructive to personal liberty."* 308 US at 340, 84 L Ed at 311 (emphasis added).

Sophisticated argument may prove a causal connection between information obtained through illicit wiretapping and the Government's proofs. As a

<sup>7</sup>In that case the Court applied the exclusionary rule of Section 605 of the Communications Act of 1934, 47 USC §605, to violations of that section [wiretapping] by federal agents.



matter of good sense, however, such connection may have become so attenuated as to dissipate the taint. 308 US at 341, 84 L Ed at 312.

In *Wong Sun*, the Court was faced with an application of this rule to circumstances very similar to the case at bar. One James Wah Toy had in that case made several statements to federal narcotics agents, which statements were held to be inadmissible against him. *Id.*, 371 US at 484-486, 9 L Ed2d at 453-454. Like your respondent Mr. Tucker, Mr. Toy had intended his statements to be exculpatory, but like Mr. Tucker's declaration, his led the agents to the source of his conviction, in that case Mr. Johnnie Yee. Learning of Yee's identity, agents immediately went to his home where they found the narcotics which were introduced at trial against Toy.

Reversing Toy's conviction for violation of federal narcotics laws, the Court, without dissent as to this point, *cf.* 371 US at 497 *ff.*, 9 L Ed2d at 461 *ff.*, expressly rejected any distinction among types of derivative evidence and held the narcotics inadmissible as clearly "come at by the exploitation" of the primary illegality. 371 US at 488, 9 L Ed2d at 455.

In his opinion for the Court, Mr. Justice Brennan stated:

... verbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest as the officers' action in the present case is no less the "fruit" of official illegality than the more common tangible fruits of the unwarranted intrusion ... (cite omitted). *Nor do the policies underlying the exclusionary rule invite any logical distinction between physical and verbal evidence ... [for] the danger of relaxing the exclusionary rules in the case of verbal evidence would seem too great to warrant introducing such a distinction.* 371 US at 484-486, 9 L Ed2d at 454 (emphasis added).



The suggestion that the statements should be admissible as the product of an "intervening independent act of free will" was rejected. *Id.*

The Court also expressly rejected any distinction between ostensibly exculpatory and incriminating statements.<sup>8</sup>

Mr. Justice White, speaking for the Court in *Alderman*, noted that petitioners with standing "would be entitled to the suppression of government evidence originating in [illegal] electronic surveillance," 394 US at 176, 22 L Ed 2d at 188 (emphasis added), and rejected Mr. Justice Harlan's proposed distinction between an overheard third party conversation and a document containing the third party's own written words as incapable of effectuating the rights involved. 394 US at 179, 22 L Ed 2d at 190, n 11. Additionally, the scope of materials made available to the defense had to be sufficiently broad to permit demonstration of a taint growing out of

[a]n apparently innocent phrase, a chance remark, a reference to what appears to be a neutral person or event, [or] *the identity of a caller or the individual*

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<sup>8</sup> See 371 US at 471, 9 L Ed2d at 455:

"The Government also contends that Toy's declarations should be admissible because they were ostensibly exculpatory rather than incriminating. First, the statements soon turned out to be incriminating, for they led directly to the evidence which implicated Toy. Second, when circumstances are shown such as those which induced these declarations, it is immaterial whether the declarations be termed "exculpatory". Thus we find no substantial reason to omit Toy's declarations from the protection of the exclusionary rule."

See also *Miranda v Arizona*, 384 US 436, 476-477, 86 S Ct 1602, 16 L Ed 2d 694, 725 (1966).

See also Note, "Developments in the Law - Confessions," 79 Harv L Rev 935, 1030-1036 (1966), where analysis of the issue concludes: "...no distinctions among categories of defendants' out-of-court statements can constitutionally be made, and the test for admissibility must be the same for confessions, admissions, and exculpatory statements."

*on the other end of a telephone . . . 394 US at 182, 22 L Ed 2d at 192 (emphasis added).*

*Kastigar, supra*, is also pertinent, differing from the case at bar only in that there the Court was looking forward in protecting the privilege while here the view is retrospective. In *Kastigar*, the Court was concerned with the scope of immunity necessary to protect the Fifth Amendment privilege. Petitioners argued that the federal use-immunity statute under consideration, 18 USC § 6002, would not adequately protect their Fifth Amendment rights because, in their view, it would not

protect a witness from various possible incriminating uses of the compelled testimony: for example, . . . leads, names of witnesses . . . 406 US at 459, 32 L Ed2d at 225.

To this, the Court responded that the statute would protect against such uses, that it

. . . provides a comprehensive safeguard, barring the use of compelled testimony as an "investigatory lead", . . . 406 US at 460, 32 L Ed2d at 226.

Moreover, the grant of immunity had to be this broad in order to protect the privilege. Speaking through Mr. Justice Powell, this Court ruled that in order to guarantee the constitutional privilege, a grant of immunity had to bar

the use of compelled testimony, as well as evidence derived directly and indirectly therefrom . . . It prohibits the prosecutorial authorities from using the compelled testimony in *any* respect . . . 406 US at 453, 32 L Ed2d at 222 (emphasis in original).

The statute, like the Fifth Amendment, allows the use of evidence only if obtained from an independent source or in no way produced by the immunity-compelled testimony. *Id.*

The interests at stake in *Kastigar* are exactly the same as those in the case at bar—the protection of the Fifth

Amendment privilege. The analogy is, in fact, expressly recognized in *Kastigar*. 406 US at 461, 32 L Ed2d at 226-227. Just as witnesses whose names are learned-as the result of immunity-compelled testimony may not be used against an accused person, so too, the testimony of a witness whose identity is learned solely as the result of a statement given in violation of the Fifth Amendment may not be used in evidence.<sup>9</sup>

<sup>9</sup>*Davis v Mississippi*, 394 US 721, 723-724, 89 S Ct 1394, 22 L Ed2d 676, 679 (1969), where the court rejected an attempt to distinguish between fingerprints and other illegally seized evidence on the grounds of the trustworthiness of the former, is also relevant:

"At the outset, we find no merit in the suggestion in the Mississippi Supreme Court's opinion that fingerprint evidence, because of its trustworthiness, is not subject to the proscriptions of the Fourth and Fourteenth Amendments. Our decisions recognize no exception to the rule that illegally seized evidence is inadmissible at trial, however relevant and trustworthy the seized evidence may be as an item of proof. The exclusionary rule was fashioned as a sanction to redress and deter overreaching governmental conduct prohibited by the Fourth Amendment. To make an exception for illegally seized evidence which is trustworthy would fatally undermine those purposes. Thus, in *Mapp v Ohio*, ... (cite omitted), we held that "*all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority inadmissible in a state court.*" (Italics supplied). Fingerprint evidence is no exception to this comprehensive rule. We agree with and adopt the conclusion of the Court of Appeals for the District of Columbia in *Bynum v United States*, 104 US App DC 368, 370, 262 F2d 465, 467 (1958):

'True, fingerprints can be distinguished from statements given during detention. They can also be distinguished from articles taken from a prisoner's possession. Both similarities and differences of each type of evidence to and from the others are apparent. But all three have the decisive common characteristic of being something of evidentiary value which the public authorities have caused an arrested person to yield to them during illegal detention. If one such product of illegal detention is proscribed by the same token all should be proscribed.'

A large number of state and federal courts have also excluded the testimony of witnesses identified as a result of constitutional violations or have otherwise refused to distinguish between physical and verbal evidence. *People v Quicke*, 71 Cal 2d 502, 78 Cal Rptr 683, 455 P2d 787 (1969); *People v Mickelson*, 59 Cal 2d 488, 30 Cal Rptr 18, 380 P2d 658 (1963); *People v Schaumlöffel*, 53 Cal 2d 96, 346 P2d 393 (1959); *People v Mills*, 148 Cal App 2d 392, 306 P2d 1005 (1957); *People v Albea*, 2 Ill 2d 317, 118 NE2d 277 (1954); *People v Schmall*, 383 Ill 280, 48 NE2d 933 (1943); *People v Martin*, 382 Ill 192, 46 NE2d 997 (1942); *People v Dannic*, 30 App Div 2d 679, 292 NYS 2d 257 (1969); *People v Peacock*, 29 App Div 2d 762, 287 NYS2d 166 (1968); *State v Rogers*, 27 Ohio App 2d 105, 198 NE2d 796 (1963); *Commonwealth v Cephas*, 447 Pa 500, 291 A2d 106 (1972); *Williams v United States*, 382 F2d 48 (5th Cir 1967); *United States v Tane*, 329 F2d 848 (2nd Cir 1964); *United States v Alston*, 311 F Supp 296 (DDC 1970); *Abbott v United States*, 138 A2d 485 (DC Ct Muni App 1958); *Somer v United States*, 138 F2d 790 (2d Cir 1943).

See also, generally, *People v Drumright*, Colo Sup Ct, 475 P2d 329 (1970); *Killough v United States*, 315 F2d 241 (DC Cir 1962); *United States v Paroutian*, 299 F2d 486 (2nd Cir 1962); *Payne v United States*, 294 F2d 723 (DC Cr 1961); *Bynum v United States*, 262 F2d 465 (DC Cir 1958); *United States v Klapholz*, 230 F2d 494 (2nd Cir 1956); *United States v Schipani*, 289 F Supp 43 (EDNY 1968); *Goodman v United States*, 285 F Supp 245 (CD Cal 1968); *United States v Birrell*, 276 F Supp 798 (SDNY 1968).

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See also *Albertson v Subversive Activities Control Board*, 382 US 70, 78, 86 S Ct 194, 15 L Ed2d 165, 171 (1965); *Murphy v Waterfront Commission*, 378 US 52, 79, 84 S Ct 1594, 12 L Ed2d 678, 695 (1964); *Malloy v Hogan*, 378 US 1, 11, 84 S Ct 1489, 12 L Ed2d 653, 661 (1964).

Any distinction between physical and verbal evidence has also been severely criticized in the legal literature. Pitler, "The Fruit of the Poisonous Tree Revisited and Shepardized," 56 Cal L Rev 579 (1968); Ruffin "Out on a Limb of the Poisonous Tree: The Tainted Witness," 15 UCLA L Rev 32 (1967); Comment, "Fruit of the Poisonous Tree — A Plea for Relevant Criteria," 115 U Pa L Rev 1136 (1967). See also Hirtle, "Inadmissible Confessions and Their Fruits: A Comment on *Harrison v United States*", 60 J Cr L C & PS 58, 61-62 (1969); Broeder, "*Wong Sun v United States*: A Study in Faith and Hope", 42 Nebr L Rev 483, 548-550 (1963); Note, 30 NYU L Rev 1121, 1123 (1955); Annotation, "Fruit of the Poisonous Tree", 43 ALR3d 385.

The proposed distinction between the testimony of a live witness and tangible evidence grows out of *Smith and Bowden v United States*, 324 F2d 879 (DC Cir 1963). In that case, inadmissible statements of appellants had led police to Holman, an accomplice and witness, and his testimony was admitted against them over objection at their trial. On appeal, the circuit court panel ruled that since the witness had initially been reluctant to testify, cf. *McLindon v United States*, 329 F2d 238, 241 n 2 (DC Cir 1964), the subsequent time for reflection and the decision to testify had dissipated the taint. 324 F2d at 881. An additional consideration given in support of the ruling was the fact that the interaction of the witness' "attributes of will, perception, memory and volition," *Id.*, also determined what testimony he would give — i.e., there was no guarantee that his testimony would be favorable to the prosecution.

This test was applied in several other District of Columbia Circuit cases, *McLindon v United States*, *supra*; *Edwards v United States*, 330 F2d 849 (DC Cir 1964); *Smith and Anderson v United States*, 344 F2d 545 (DC Cir 1965); *Brown v United States*, 375 F2d 310 (DC Cir

1966), with the results turning on the various judges' assessments of the effects of the factors of "will, perception, memory and volition", outlined in *Smith and Bowden*. It was also applied by the Michigan Court of Appeals in the original proceeding in this case. *People v Tucker*, 19 Mich App 320, 172 NW2d 712 (1969).<sup>10</sup> See also *United States v Tane*, *supra*.

Upon analysis, this test is not logically defensible. It is deficient first, in that it ignores the clear language in *Wong Sun* rejecting any distinction between physical and verbal evidence, 371 US at 485-486, 9 L Ed2d at 454. While the opinion in *Wong Sun* was in reference to the appellant's and not a witness' statement, nothing in the opinion would admit such a distinction and neither any of the factors listed in *Smith and Bowden* nor any of the policies underlying the exclusionary rule distinguish between such persons.

Moreover, *Wong Sun* excluded from use against Toy narcotics found in Yee's possession as a result of Toy's inadmissible statement. The only distinction between the case at bar and *Wong Sun* is that in this case it is testimony which was suppressed and not narcotics. However, the narcotics seized in *Wong Sun* could not have been used against Toy without Yee's statement connecting them to Toy. Cf. 371 US at 475, 9 L Ed2d at 447. This Court's decision rejecting the narcotics as against Toy necessarily also rejected Yee's testimonial evidence from use against Toy as well.

The proposed distinction is also testimony in that it ignores the source of the proffered witness' testimony and the relationship between that source and the primary illegality. Additionally, except in the case of a witness

<sup>10</sup> As to the continuing vitality of *Tucker* in Michigan, see *People v Robinson*, 48 Mich App 253, 210 NW2d 372 (1973), 48 Mich App at 260, n 1, lv den 393 Mich 793, citing the District Court decision in this case with approval. See also *People v Weaver* 35 Mich App 504, 192 NW2d 572 (1971), 35 Mich App at 515, n 5.

who is an accomplice, the voluntariness of a witness' testimony is irrelevant,<sup>11</sup> as the compulsory process powers of the court can readily command his or her appearance.

Nor is there any distinction in terms of deterrence<sup>12</sup> between physical and verbal evidence. An officer attempting to obtain evidence as a result of a statement is interested in finding whatever evidence is available therefrom, physical or verbal, and would be actively encouraged to obtain inadmissible statements if a verbal direct fruit of such statements were nevertheless admissible at a suspect's trial. *Alston, supra*, 311 F Supp at 298-299; *Pitler, supra*, 56 Cal L Rev at 620.

Finally, physical and verbal evidence cannot be distinguished on the ground that physical evidence "speaks for itself", Brief of Petitioner, p 6, that there is no guarantee that the witness' testimony will be favorable to

<sup>11</sup> In a situation such as *Smith and Bowden*, where the witness is an accomplice, voluntariness is still irrelevant since it is unrelated to the source of the witness' discovery, but even if voluntariness were a factor, the focus would be on the use of improper means in obtaining a waiver of the privilege, *Harrison v United States, supra*; *United States v Tane, supra*, and not on the mere fact that the witness, for whatever reason, ultimately decided to testify. See also: *Ruffin, supra*, 15 UCLA L Rev at 42 and cases cited therein; Note, "The Supreme Court, 1967 Term", 82 Harv L Rev, *supra*, at 220-224; Note, "Developments in the Law-Confessions", 79 Harv L Rev, *supra*, at 1026-1028; *Lefkowitz v Turley*, \_\_\_ US \_\_\_, 94 S Ct \_\_\_, 38 L Ed2d 274 (1973); *Garrity v New Jersey*, 385 US 493, 87 S Ct 616, 17 L Ed2d 562 (1967); *Fahy v Connecticut*, 375 US 85, 84 S Ct 229, 11 L Ed2d 171 (1963).

<sup>12</sup> Petitioner argues that because the officers complied with the law as it existed at the time of the interrogation in this case, there can be no deterrent effect from suppression. Brief of Petitioner, p 10. However, because this case is within the class of cases to which *Johnson v New Jersey, supra*, applies *Miranda* retroactively, the question in this case must be considered in light of the deterrent effect it would have had if the interrogation had occurred after *Miranda* or else without regard to the deterrent effect altogether.



the prosecution, or that the witness' testimony is subject to "all the rigors of cross-examination", Brief of Petitioner, pp 12-13. These considerations do not go to the relationship between the discovery of the evidence and the police illegality and are for that reason alone invalid.

Moreover, just as a search may not be justified on the basis of what it produces, *Sibron v New York*, 392 US 40, 62-63, 88 S Ct 1889, 20 L Ed2d 917, 934-935 (1968); *Johnson v United States*, 333 US 10, 16-17, 68 S Ct 367, 92 L Ed 435, 441-442 (1948), the admissibility of evidence has never turned on whose side it favors or on whether it was, in fact heroin as opposed to, for example, lactose, or was, in fact, marijuana as opposed to, for example, oregano. Similarly, physical evidence is subject to cross-examination-type scrutiny much the same as verbal evidence by examination of the chemist, toxicologist, fingerprint or ballistics expert who has analyzed the evidence and by submission for independent examination by a defense expert.

Policy considerations also dictate rejection of this test. Neither *Smith and Bowden* nor any of the cases attempting to apply the *Smith and Bowden* test have ever articulated any standards for applying the test, and it appears that none are available. Petitioner suggests none. In *Smith and Bowden* and *Edwards, supra*, for example, the later-overcome expressions of reluctance by the witnesses were viewed as attenuating the taint and thus permitting admission of the testimony.

In *Tucker*, the Michigan Court of Appeals reasoned just the opposite and found that since Henderson's testimony appeared to be voluntary, there was no exploitation and the testimony was therefore admissible.<sup>13</sup> In *Smith and Anderson, supra*, the witness'

<sup>13</sup>There is no basis whatever in the record of this case for the inference by the Michigan Court of Appeals that Henderson would have possibly appeared voluntarily. 19 Mich App at 330, 172



apparent voluntariness was viewed as not breaking the chain, and the testimony was therefore suppressed. In *Tane, supra*, pressure placed on the witness after his initial reluctance was viewed as exploitation of the taint, and the testimony was therefore inadmissible.

Any attempt to choose among these cases, to determine whether initial reluctance "attenuates" or "exploits" the taint or whether initial willingness to testify is insufficient to break the chain or does in fact break the chain, is purely arbitrary, for there is no relationship between any of these factors and the objectives of the exclusionary rule.

Additionally, tests which attempt to draw definite conclusions from ambiguous acts have traditionally been disfavored in the law. As stated by Sir Frederick Pollock:

It concerns us as lawyers to know not so much what philosophers will call an act as of what kinds of acts, and to what purpose, the law takes notice. Generally speaking, the law has regard only to such acts as are voluntary and manifest. This is a necessary consequence of the nature of legal justice. The judgment of law must not only be but appear just, and can deal only with that which is capable of proof. The secret counsels and resolves of a man's mind are voluntary, but not manifest. . . *As to acts*

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NW2d at 718. Such an inference, in the nature of an "inevitable discovery" argument, is in fact foreclosed in this case by the States' Stipulation (Appendix, p 29) that the *only* basis for the discovery of Henderson's existence and identity was Mr. Tucker's inadmissible statement. Cf. *Davis v Mississippi, supra*, 394 US at 723-724, 22 L Ed2d at 679; *Bynum v United States, supra*; *United States v Paroutian, supra*, 299 F2d at 489; *Pitler, supra*, 56 Cal L Rev at 627-630.

However, in the event that this Court should adopt the *Smith and Bowden* test, Respondent will be entitled to a remand for an evidentiary hearing on the voluntariness of Henderson's testimony. This request was seasonably made in the District Court and has been preserved on appeal.

*of the mind which are not directly manifested in outward performances, the law will not generally take account of them, both because they cannot be certainly known, and because no-certain result can be assigned to them.* F. Pollock, *Jurisprudence and Legal Essays*, 79-80 (1961) (emphasis added).

*Somer, supra*, illustrates well the problems that the proposed distinction would entail. In that case, an illegal search of defendant's apartment led agents to defendant's wife, who was found on the premises. Upon questioning at the apartment, Mrs. Somer told the agents when her husband would return, and on the basis of this information they went out to the street and stopped defendant as he pulled up. Observing a five pound bag marked "granulated sugar" behind the front seat and learning from defendant of a quantity of alcohol in the trunk, the officers arrested defendant and seized the sugar and alcohol.

The district court ordered "all evidence and information obtained. . . as a result of a search and seizure in the apartment" suppressed, 138 F2d at 791, but admitted the evidence found in the car. The Second Circuit, per L. Hand, J., reversed on the basis of *Silverthorne*, holding:

As the record now stands, it was the information unlawfully obtained which determined their course. Since therefore the seizure must be set down to information which the officers were forbidden to use, it was itself unlawful under settled law. *Id.*

If the distinction proposed by Petitioner were adopted broadly, the evidence obtained through Mrs. Somer's statements would potentially be admissible if her testimony were found to be voluntary. This would effectively overrule *Wong Sun*, however, and permit the police to profit at trial from their uncontested, *Id.*, illegality.

If the distinction were applied only in the case of evidence used at trial, however, cf. *Brown, supra*, 375

F2d at 319, and not with regard to statements leading to evidence introduced at trial, admissibility would turn on where in the chain the "live" evidence occurred rather than on the strength of the chain. If Mrs. Somer's statements had led to a witness used against Somer, the two statements would be treated differently despite being equally related to a tainted source and both having been sought for the same purpose.

Similarly, if Mrs. Somer's statements, or physical evidence, illegally obtained, had led to a witness against Somer plus the physical evidence, the former would be potentially admissible while the latter was suppressed despite identical sources for the two. The results would be anomalous.

The commentators have expressed a similar opinion. Judge Ruffin concluded that "the possible existence or working of" these "mentalistic entities" "are irrelevant to the purpose of the decision," 15 UCLA L Rev at 63, and, further, that

...the will and volition concepts as employed in the *Smith and Bowden* line of cases are spurious and unnecessary, and can be manipulated, whatever the facts or merits of the case, to justify any decision deemed a priori desirable.

15 UCLA L Rev at 64.

At the conclusion of his analysis, Pitler states simply:

No distinction remains, if ever one existed, between tangible evidence and "live" witnesses when determining what is, or is not, the fruit of the poisonous tree. Any other result is inconsistent with the deterrence rationale of the "fruit of the poisonous tree" doctrine. 56 Cal L Rev at 624.

... it is clear that if the police were permitted to utilize illegally obtained confessions for links and leads rather than being required to gather evidence independently, then the *Miranda* warnings would be of no value in protecting the privilege against

self-incrimination. The requirement of a warning would be meaningless, for the police would be permitted to accomplish indirectly what they could not accomplish directly, and there would exist no incentive to warn. *Id.*, at 620.

Similarly, in the comment at 115 U Pa L Rev, *supra*, the author concludes:

... [this distinction] is based not upon the police conduct, nor upon the nature of the crime involved, but upon the vagaries and peculiarities of the individual witnesses and the promptness with which they respond to a governmental request for assistance. How such a line between "tainted" and "untainted" evidence can be considered anything but "coin flipping" is difficult to perceive.

115 U Pa L Rev at 1147.

Even in a case note written prior to *Wong Sun* and *Mapp v Ohio*, 367 US 483, 81 S Ct 1684, 6 L Ed2d 1081 (1961), the author is of the opinion that where physical evidence is suppressed, there is no logical distinction between physical and verbal evidence. Note, 30 NYU L Rev, *supra*, at 1123.

Ultimately, the *Smith and Bowden* test would have the admissibility of evidence turn on a witness' feelings toward an accused, the courts, the police and the victim. Rather than being based on legal principles, the admissibility of testimony would depend on motives of friendship, fear and revenge. By admitting direct, foreseeable products of police illegality, such a rule would actively encourage that activity.

In the case at bar, it would perhaps be easier to see the need for suppression of Henderson's testimony if Mr. Tucker's statement had been the product of physical coercion. Mr. Tucker did give an admittedly inadmissible statement, however, and the means by which he was induced improperly to waive his Fifth Amendment

privilege are irrelevant. *Wong Sun, supra*; *Miranda, supra*; *Harrison, supra*; see also *Irvine v California*, 347 US 128, 133-134, 138, 74 S Ct 381, 98 L Ed 561, 569-570, 572 (1954), plurality opinion of Mr. Justice Jackson and concurring opinion of Mr. Justice Clark. As a result solely of that statement the government obtained the testimony of a key prosecution witness. The statement itself has been suppressed, but the government was able to use the testimony of the witness against Mr. Tucker at trial because the testimony is not tangible evidence. This Court has never recognized this distinction and has, in fact, recently rejected it.

The Fifth Amendment guarantees that "no person... shall be compelled in any criminal case to be a witness against himself" or be "the conduit by which the police acquire evidence." *Bivens v Six Unknown Federal Narcotics Agents*, 403 US 388, 414, 91 S Ct 1999, 29 L Ed2d 619, 637 (1971), opinion of Burger, Ch. J., dissenting. Unless the decision below is affirmed, this principle will be defeated.

For all the reasons stated above, the decision of the Court of Appeals should be affirmed.

### III.

**ABANDONMENT OR MODIFICATION OF MIRANDA WOULD NOT BENEFIT LAW ENFORCEMENT, WOULD DISRUPT THE ADMINISTRATION OF JUSTICE, WOULD RETURN THIS COURT TO THE DUE PROCESS TEST IT FOUND INCAPABLE OF ADMINISTRATION, AND WOULD SERIOUSLY WEAKEN THE FIFTH AMENDMENT PRIVILEGE.**

#### A.

The question before this Court at this time is not whether the warnings set out in *Miranda v Arizona* should be required but, rather, given the existence of this requirement, has it been shown to be so clearly erroneous

and such an impairment to the administration of justice as to justify departure from the principles of *stare decisis*. *Gilman v Philadelphia*, *supra*; *Marshall v Baltimore & Ohio R Co.*, *supra*; *Goodtitle ex dem. Pollard v Kibbe*, *supra*.

Prior decisions of this Court should only be departed from where they are shown to be clearly erroneous. There has been no such showing by Petitioner.

Uncertainty and vacillation in the law should be avoided, for they interfere with the administration of justice and tend to cast the courts in an unfavorable public light.

Departure from *Miranda* as it presently exists would produce more damage than benefit to the criminal justice system. It would disrupt the administration of the law and cause confusion in the lower courts. It would create administrative problems requiring extensive and protracted litigation to resolve without providing commensurate benefit to law enforcement.

*Miranda* does not prevent police from interrogating persons who knowingly and voluntarily waive their right to silence. *Miranda* does not prevent questioning of witnesses. The police must now merely inform a suspect of the rights available at interrogation and the consequences of waiver of those rights, and if those rights are asserted the exercise must be respected.

*Miranda* has provided an objective standard for determining the validity of purported waivers of the privilege, freeing this Court and the lower courts from the "elusive, measureless standard" of voluntariness previously existing. *Reck v Pate*, 367 US 433, 455, 81 S Ct 1541, 6 L Ed2d 948, 962 (1961), Clark, J., dissenting. While judgments as to waiver must still be made, there is now a clear standard against which to measure. This standard is also a guide to the police, for it reduces the guesswork involved in any attempt to determine whether

interrogation may lawfully proceed in a given instance.

The studies which have been conducted to date indicate that no harm has come to law enforcement or the judicial system from the operation of *Miranda*. Cf. Younger, "Interrogation of Criminal Defendants - Some Views on *Miranda v Arizona*", 35 Fordham L Rev 255 (1966); Note, "Interrogations in New Haven: The Impact of *Miranda*", 76 Yale L J 1519 (1967); Griffiths & Ayres, "A Postscript to the *Miranda* Project: Interrogation of Draft Protesters", 77 Yale L J 300 (1967); Seeburger & Wettick, "*Miranda* in Pittsburgh - A Statistical Study", 29 U Pitt L Rev 1 (1967); Medalie, Zeitz & Alexander, "Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement *Miranda*", 66 Mich L Rev 1347 (1968); McCullough, "Balancing the Rights of the Accused and the Public in Constitutional Probity", 54 ABAJ 273 (1968); Driver, "Confessions and the Social Psychology of Coercion", 82 Harv L Rev 42 (1968); Zeitz, Medalie & Alexander, "Anomie, Powerlessness & Police Interrogation", 60 J Cr L C & PS 314 (1969); Leiken, "Police Interrogation in Colorado", 47 Denv L J 1 (1970).

## B.

The practice of incommunicado police interrogation of persons suspected of crime for the purpose of inducing "voluntary" waivers of the Fifth Amendment privilege and assisting in the conviction of the accused by his or her own statements is of relatively recent historical origin. While several factors are involved in the development of the practice, including the establishment in the nineteenth century of full-time police departments and the growth in this country of the doctrine of separation of powers, cf. Barrett, "Police Practices & The Law - From Arrest to Release or Charge", 50 Cal L Rev 11,

17-18 (1962), incommunicado interrogation by police is in no small part the step-child of the practice of judicial interrogation of an accused at trial, abolished in the seventeenth century, *cf.* Levy, L.W., *Origins of the Fifth Amendment* (1968), and interrogation of an accused by the magistrate at examination, abolished in the nineteenth century, Barrett, *supra*, at 17-18; Note, "An Historical Argument for the Right to Counsel During Police Interrogation", 73 Yale L J 1000, 1034-1041 (1964); Maitland, *Justice & Police* 100 (1885).

The system which has developed operates in secret, without courtroom safeguards or a record being made, and with judicial review highly limited. Even when conducted without overt pressure, the balance in interrogation is weighted heavily in favor of the interrogator. Driver, *supra*; Note, "Developments in the Law - Confessions", *supra*, at 1004.<sup>14</sup>

Regardless of whether police interrogation is useful in solving crime,<sup>15</sup> it is a process which "easily glide(s) into the evils of 'the third degree'", *Mallory v United States*,

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<sup>14</sup> *Bronston v United States*, 409 US 352, 93 S Ct 595, 34 L Ed2d 568 (1973), is relevant to the psychological pressures on a suspect during interrogation. Speaking through the Chief Justice, this Court in that case noted that, "[u]nder the pressures and tensions of interrogation, it is not uncommon for the most earnest witnesses to give answers which are not entirely responsive. Sometimes the witness does not understand the question, or may in an excess of caution or apprehension read too much or too little into it." 409 US at 358, 34 L Ed2d at 574. Bronston was a wealthy, well-counseled motion picture executive. The reasoning therein applies *a fortiori* to an uncounseled, poorly educated suspect being interrogated at a precinct station.

<sup>15</sup> Petitioner's *Amici* Americans for Effective Law Enforcement and the International Association of Chiefs of Police, Inc., argue at p 13 of their Brief that interrogation is necessary in some cases as "the only means of proving the guilt of the perpetrator of a crime." *Id.* However, the examples therein ignore the fact that in



354 US 449, 453, 77 S Ct 1356, 1 L Ed2d 1479, 1482 (1957), and implicitly threatens the Fifth Amendment privilege. As this Court long ago noted in *Brown v Walker*, 161 US 591, 596-597, 40 L Ed 818, 821 (1896):

The ease with which the questions put to [a suspect] . . . may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions . . .

is so entwined in the process of interrogation that the privilege is quickly subject to loss or erosion unless carefully guarded.

If the threat to the privilege were merely implicit, it is unlikely that *McNabb v United States*, 318 US 332, 63 S Ct 608, 87 L Ed 819 (1943), *Mallory v United States*, *supra*, or *Miranda* would ever have been necessary. This Court's confession decisions since *Brown v Mississippi*, 297 US 278, 56 S Ct 461, 80 L Ed 682 (1936), unfortunately demonstrate, however, that the threat has been very real indeed. "Voluntary" confessions have been induced by hanging, *Brown, supra*, whipping, *Brown*, starvation, *Payne v Arkansas*, 356 US 560, 78 S Ct 844, 2 L Ed2d 975 (1958), *Reck v Pate, supra*, and prolonged detention, *Davis v North Carolina*, 384 US 737, 86 S Ct 1761, 16 L Ed2d 895 (1966); *Mallory v United States*,

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the situations cited there can be no lawful custodial interrogation for the reason that there is insufficient evidence to justify taking anyone into custody. As Mr. Justice Frankfurter stated for this Court in *Mallory, infra*:

Presumably, whomever the police arrest they must arrest on "probable cause." It is not the function of the police to arrest, as it were, at large and to use an interrogating process at police headquarters in order to determine whom they should charge before a committing magistrate on "probable cause". 354 US at 456, 1 L Ed2d at 1484.

*supra*. The statements produced by these "unfettered exercise(s) of free will", *Malloy v Hogan, supra*, 378 US at 8, 12 L Ed2d at 659, have been offered into evidence by prosecutors, accepted into evidence by trial judges and their use has been sanctioned by appellate courts.

Prior to *Miranda*, this Court found itself in the position of attempting to preserve the integrity of the trial process in situations where a trial was, in effect, an appeal from the interrogation. *Cf. Escobedo v Illinois*, 378 US 478, 486-488, 84 S Ct 1758, 12 L Ed2d 977, 983-984 (1964); Comment, "The Coerced Confession Cases in Search of a Rationale", 31 U Chi L Rev 313, 321 (1964). Moreover, the standard on "appeal" was "illusory", Dession, "The New Federal Rules of Criminal Procedure", 55 Yale L J 694, 708 (1946); *cf. Clark, J., dissenting in Reck v Pate, supra*, and was not followed by the lower courts with any degree of regularity. Note, "Developments in the Law - Confessions", *supra*, at 984; see also *Miranda, supra*, 384 US at 509, 16 L Ed2d at 743, Harlan, J., dissenting.

This Court itself reviewed only about one confession case a year between *Brown* and *Miranda*, and none of these decisions were able to promulgate a standard which the Court could articulate or the lower courts, prosecutors or police could apply. The availability of the privilege still turned more on a suspect's power of resistance, and to a lesser extent his or her social and educational level, *cf. Zeitz, Medalie & Alexander*, 60 J Cr L C & PS, *supra*, than on any other factors.

Moreover, the Court had already come to recognize that reliance on confessions was inherently dangerous to the maintenance of the accusatorial system, for as Dean Wigmore stated:

"... The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power... If there is a right to an answer, there soon seems to be a right to the expected answer..." 8

Wigmore, Evidence 309 (3d ed 1940), cited in *Escobedo, supra*, 378 US at 489, 12 L Ed2d at 985.

See also *Mallory, supra*, 354 US at 452-453, 1 L Ed2d at 1482.

*Miranda* recognized that because of the importance of interrogation to the fairness of a trial, *Schneckloth v Bustamonte*, \_\_\_\_ US \_\_\_\_, 93 S Ct \_\_\_\_, 36 L Ed2d 854, 870 (1973), the state has a primary obligation fully to inform a suspect of the rights available at custodial interrogation. Warnings must be given in order to insure the existence of the privilege in fact as well as form, cf. *Powell v Alabama*, 287 US 45, 57, 53 S Ct 55, 77 L Ed 158, 164 (1932), and to insure that any waiver is made knowingly. *Johnson v Zerbst*, 304 US 458, 58 S Ct 1019, 82 L Ed 1461 (1938).

The exhaustive analysis of the history of confessions law prepared on the eve of *Miranda*, Note, "Developments in the Law—Confessions", *supra*, similarly concludes that warnings must be given in order to hope to protect the privilege. 79 Harv L Rev at 981-982.

Adherence to the requirement of complete warnings is sound constitutional policy as well. Fear that citizens will exercise their constitutional rights if known to them, or fear that exercise of rights will harm the administration of law, which fear is "envenomed" during a time of perceived crime increase "by our unexpiated heritage of racism and enflamed by our national fascination with violence", McGowan, "Rule-Making and The Police", 70 Mich L Rev 659, 660 (1972), has no place in a democracy:

...no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. No system worth preserving should have to *fear* that if an accused is permitted to consult with a lawyer, he

will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system. *Escobedo, supra*, 378 US at 490, 12 L Ed2d at 985-986 (emphasis in original).

The requirements established in *Miranda* are also necessary to help make the interrogation process less of a contest of wills. As Mr. Justice Story remarked in this regard almost a century and a half ago:

It has been contrived, (it is pretended) that innocence should manifest itself by a stout resistance, or guilt by a plain confession; as if a man's innocence were to be tried by the hardness of his constitution, and his guilt by the sensibility of his nerves.

3 Story, *Commentaries on the Constitution of the United States*, §1782 (1833).

As noted in the studies cited in Part IIIA, *supra*, the fears that *Miranda* would cripple or in any significant manner impair law enforcement have proven unfounded.<sup>16</sup> Indeed, the main criticism of the rule today is directed at its inflexibility rather than any alleged crippling effect. Professor Vorenberg has noted, however, that elimination of *Miranda* would not in any material way solve the problems of crime:

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<sup>16</sup> Similar criticisms were raised and then shown to be unwarranted after other decisions similarly protecting constitutional rights. Cf. *Elkins v United States*, 364 US 206, 218-221, 80 S Ct 1437, 4 L Ed2d 1669, 1678-1679 (1960), regarding the experiences of the Federal Bureau of Investigation subsequent to *Weeks v United States*, 232 US 383, 34 S Ct 341, 58 L Ed 652 (1914), and the experiences in California subsequent to *People v Cahan*, 44 Cal 2d 434, 282 P2d 905 (1955). Regarding the effects of *People v Dorado*, 62 Cal 2d 338, 42 Cal Rptr 169, 398 P2d 361 (1965), requiring warnings very similar to *Miranda*, see Younger, *supra*, 35 Fordham L Rev at 256-257.

...there... is an impression that has been created, and I think people at a very high level have responsibility for that impression, that somehow if we could reverse *Miranda* and do away with a few other protective provisions, that the police would be able to stop crime. I think a policeman, left to think it through himself, knows that is not so. Testimony of Professor James Vorenberg, former Executive Director, President's Commission on Law Enforcement and Administration of Justice, Hearings on H. Res. 17 before the Select Committee on Crime of the House of Representatives, 91st Cong., 1st Sess. 267, 278 (1969).

Moreover, strict adherence to the rule is necessary for the protection of the rights subject to loss.<sup>17</sup> This is well illustrated by this Court's experience with *McNabb* prior to the announcement of a *per se* rule in *Mallory*. Cf. Hogan & Snee, "The *McNabb-Mallory* Rule: Its Rise, Rationale and Rescue", 47 Geo L J 1 (1958).

If *Miranda* had truly created serious problems of law enforcement in the states, this Court was not the only place where relief could have been obtained. The states were left free by the Court to consider alternative

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<sup>17</sup>Cf. Hoover, J. Edgar, *FBI Law Enforcement Bulletin*, September 1952, pp 1-2:

"...When any person is intentionally deprived of his constitutional rights, those responsible have committed no ordinary offense. A crime of this nature, if subtly encouraged by failure to condemn and punish, certainly leads down the road to totalitarianism." Cited in *Elkins, supra*, at 364 US at 218, 4 L Ed2d at 1678.

American Bar Association Project on Standards for Criminal Justice, *The Urban Police Function* (Tentative Draft, 1972) Sec. 5.1:

"Since a principal function of police is the safeguarding of democratic processes, if police fail to conform their conduct to the requirements of law, they subvert the democratic process. . ."

measures as long as they were fully as effective as the *Miranda* warnings. *Id.*, 385 US at 444, 467, 16 L Ed2d at 706, 719-720. That there has been no rush by the states to substitute for the rule set out in *Miranda* is testimony to its non-disruptive effects.

It is suggested by Petitioner that this Court return to the due process test existing prior to *Miranda*. Brief of Petitioner, p 15. Petitioner's *Amici* Americans for Effective Law Enforcement and International Association of Chiefs of Police, Inc., argue that the Court should either return to the prior standard or modify *Miranda* to condone technical or inadvertent errors or errors where reversal would produce a miscarriage of justice. Brief of *Amici*, AELE-IACP, p 26.

The error in this case, failure to advise an indigent of his right to court-appointed counsel, cannot reasonably be considered a mere technicality. Even if it were, however, sanctioning "technical" errors would effectively overrule *Miranda*, for decisions as to what is technical and what is gross or egregious would return the Court to a determination of the totality of the circumstances. The same considerations compel rejection of a "miscarriage of justice" exception. Similarly, inadvertence, like good faith, is irrelevant. *Beck v Ohio*, 379 US 89, 85 S Ct 223, 13 L Ed2d 142 (1964).

The ease of giving the full warnings balanced against the strong social importance of the privilege strongly argues against any modification, *Miranda, supra*, 384 US at 468, 16 L Ed2d at 720, for if the rule were modified, police would also be encouraged to give less than full attention to assuring that a suspect is fully informed.

Petitioner's proposed approach ultimately fails, however, because of its intrinsically arbitrary nature:

... [it] involves a great deal of subjectivity on the part of judges, making it extremely difficult to draw any real lines of distinction. Unable to foresee what activity will result in the exclusion of evidence, law

enforcement officials may find it difficult to establish workable rules of procedure and convenient not to take the proscription seriously. Pitler, 56 Cal L Rev, *supra*, at 583.

Mr. Justice Jackson, in his plurality opinion for four Justices, and Mr. Justice Clark, in his concurring opinion, in *Irvine, supra*, touch the heart of the problem with such an approach:

We are urged to make inroads upon Wolf by holding that it applies only to searches and seizures which produce on our minds a mild shock, while if the shock is more serious, the states must exclude the evidence or we will reverse. . . . We think. . . that a distinction of the kind urged would leave the rule so indefinite that no state court could know what it should rule in order to keep its processes on solid constitutional ground. . . .

We decline to introduce vague and subjective distinctions. 347 US at 133-134, 98 L Ed at 569-570, opinion of Jackson, J.

Of course, we could sterilize the rule announced in Wolf by adopting a case-by-case approach to due process in which inchoate notions of propriety concerning local police conduct guide our decisions. But this makes for such uncertainty and unpredictability that it would be impossible to foretell—other than by guesswork—just how brazen the invasion of the intimate privacies of one's home must be in order to shock itself into the protective arms of the Constitution. 347 US at 138, 98 L Ed at 572, opinion of Clark, J.

See also W. Schaefer, *The Suspect and Society* 34 (1967).

*Miranda* was decided because prior efforts to obtain compliance with the Constitution by local courts, prosecutors and police were unsuccessful. It was made necessary by abuses that went almost completely un-

checked anywhere but in this Court, and by this Court's incapacity to give justice to all but a few of the persons who petitioned for relief. The "now familiar warnings" *Bustamonte, supra*, \_\_\_\_ US at \_\_\_\_, 36 L Ed2d at 865 have provided "undiluted respect" for the Fifth Amendment privilege, an opportunity for safeguarding the trial process, and an administrable standard for judicial review in "a judicial system in which even the guilty are not to be convicted unless the prosecution 'shoulder the entire load'." *Tehan v Shott*, 382 US 406, 416, 415, 86 S Ct 459, 15 L Ed2d 453, 460, 459 (1965). Moreover *Miranda* has not harmed law enforcement.

*Miranda v Arizona* should not be overruled or modified; it should be adhered to in its entirety.

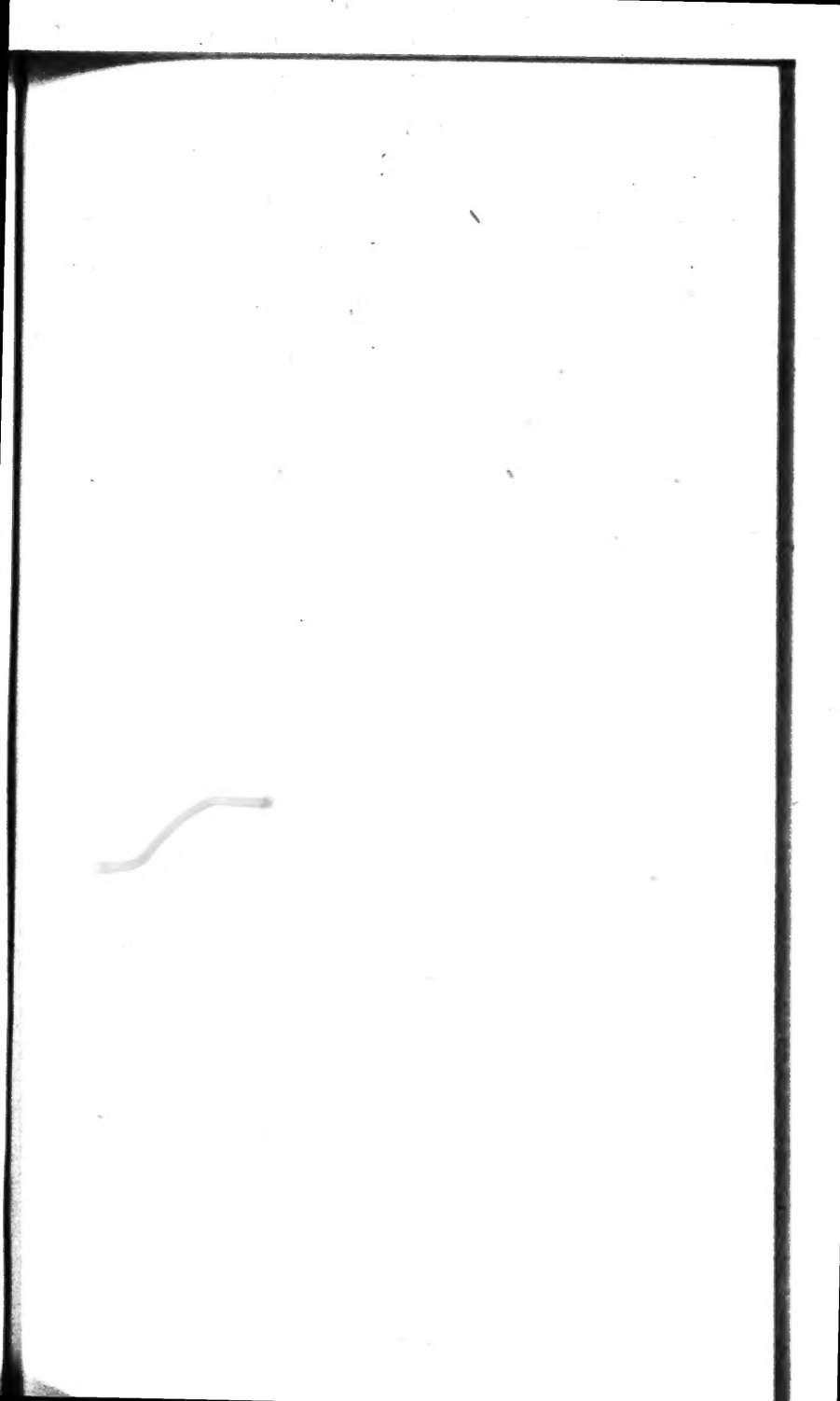
### CONCLUSION

For all the reasons stated above, the decision of the Court of Appeals should be affirmed or, in the alternative, the writ of certiorari should be dismissed as improvidently granted.

Respectfully submitted,

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# **In the Supreme Court of the United States**

**OCTOBER TERM, 1973**

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**No. 73-482**

**STATE OF MICHIGAN, PETITIONER**

**v.**

**THOMAS W. TUCKER**

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SIXTH CIRCUIT**

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**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**

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## **INTEREST OF THE UNITED STATES**

The United States has a direct interest in the constitutional standards governing the admissibility of relevant evidence in criminal trials. An Act of Congress (18 U.S.C. 3501) reflects the public policy of the United States that all confessions shall be admissible in evidence if given voluntarily. While this case does not involve the admissibility of a confession, the same policy applies with equal, if not greater, force to the admissibility of evidence to which law enforcement officers are led by investigation of a voluntary statement, where such evidence is of independent probative value. Moreover, there are occasions when, because of uncertainty as to whether *Miranda* warnings need be

given or because of unintentional oversight, the four-fold *Miranda* warnings are not administered prior to interrogation by law enforcement officers employed by various agencies of the United States. Whether the exclusionary rule formulated in *Miranda v. Arizona*, 384 U.S. 436, is to be extended to exclude not only the statements made but probative evidence discovered as a result of those statements is, therefore, of significant concern to the United States.

#### STATEMENT

The factual background of this case is set forth in the Brief for the Petitioner (pp. 4-5) and need not be restated here. We present only those facts directly relevant to the legal issues to which we address ourselves in this brief.

After being lawfully arrested for rape, respondent was interrogated by the police. Prior to the commencement of such interrogation, he was advised of his right to remain silent and his right to consult with counsel (but not his right to the appointment of counsel), in accordance with the practice then in effect.<sup>1</sup> Respondent related an alibi explaining his bloody appearance and told the police that at the time of the crime he was with a friend, one Robert Henderson. When the police contacted the "alibi" witness for corroboration, Henderson's statement tended instead to incriminate respondent.

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<sup>1</sup> The interrogation took place on April 19, 1966, and *Miranda v. Arizona*, 384 U.S. 436, was not decided until some two months later, on June 13, 1966. Since, however, the trial here took place after *Miranda*, its principles are applicable. *Johnson v. New Jersey*, 384 U.S. 719, 732-733.

While respondent's statements to the interrogating officers were not admitted at trial because they failed to meet the test of the intervening decision in *Miranda*, respondent contended also that the identity of the "alibi" witness was the product of the *Miranda* violation and that his testimony should consequently have been suppressed as the "fruit of the poisonous tree." Rejecting this argument, the state courts affirmed the conviction. However, the United States District Court for the Eastern District of Michigan granted respondent's petition for a writ of habeas corpus, finding that the witness' testimony was inadmissible because of the *Miranda* violation (Pet. App. 14-21). The Court of Appeals for the Sixth Circuit affirmed, ruling that such evidence was the "fruit of the poisonous tree" (Pet. App. 13-14).

#### SUMMARY OF ARGUMENT

This case involves the admissibility of evidence (the testimony of a witness) derived from investigation of a statement made to police by respondent while lawfully in custody but not fully advised of his rights as prescribed by *Miranda v. Arizona*, 384 U.S. 436. The case raises two analytically distinct issues: the first concerns the scope of the privilege against self-incrimination itself, which we submit does not extend to informal custodial interrogation which elicits statements that are not admitted at trial, but merely lead to other evidence; the second issue, in connection with which it is assumed that the constitutional privilege is held to apply to such interrogation, is whether the failure to give the *Miranda*



warnings should result not only in exclusion of the statements but of their fruits as well.

1. The threshold issue involves the scope of the privilege against self-incrimination as applied in the context of informal custodial interrogation. Since the purpose of the four-fold warning prescribed by *Miranda* is to insure that statements are not elicited from a suspect in violation of the self-incrimination clause, it is necessary to determine whether the same protection which is accorded to a witness compelled to testify under oath before a grand jury or a similar body—i.e., a privilege against being compelled to give statements which could be used against him directly or as a source of other evidence—should be accorded to a person who is lawfully incarcerated and is subject to informal custodial interrogation (which does not involve any police conduct that would render the statement involuntary under traditional standards).

Our submission is that this issue differs significantly from that presented in cases such as *Counselman v. Hitchcock*, 142 U.S. 547, where the Court held that a claim of the privilege against self-incrimination, asserted in resisting the giving of compelled (under threat of imprisonment for contempt) sworn testimony before a grand jury, may not be overridden by a statutory grant of immunity limited to testimonial use of the compelled statements and not protecting against derivative use. We submit that *Counselman* should not be ex-

tended to cover the materially different situation here involved.

Our contention is based principally on the fact that few if any of the policies heretofore recognized by this Court to underlie the privilege against self-incrimination are adversely implicated by informal custodial interrogation which leads to the discovery of other evidence (provided, of course, that the statements are not secured through the kind of offensive police conduct recognized prior to *Miranda* as vitiating the admissibility and voluntariness of a confession). These policies, outlined by the Court in *Murphy v. Waterfront Commission*, 378 U.S. 52, 55, include few values that are threatened by the position for which we contend. Such interrogation cannot lead to the introduction of self-deprecatory statements of questionable reliability. Nor is there any question here of use of cruel or inhumane methods to extract admissions from a suspect.

Moreover, two of the constitutional policies catalogued in *Murphy* are absent here, while present in the *Counselman* situation, thus supporting a distinction between the two situations for purposes of delineating the scope of the privilege: (1) In the case of formal testimony before a grand jury, at a trial, or in a legislative proceeding, the individual is subjected to the "cruel trilemma" of contempt, perjury, or self-incrimination, whereas in the context of informal interrogation, while statements may in some senses be

considered "compelled", neither silence nor falsehood exposes the subject of interrogation to sanction; (2) in the *Counselman* formal proceedings context, a witness may be called to testify without any showing that his evidence is legitimately necessary to the conduct of the proceedings, so that we can have no assurance that his "zone of privacy" is being invaded justifiably; here, by contrast, a fully justified probable cause arrest of the suspect has been made, the information sought from him is demonstrably pertinent to a criminal investigation in progress, and no right of his "to be left alone" is being infringed.

Apart from the foregoing distinctions deriving from considerations of constitutional policy, we will show below that there are significant historical and analytical weaknesses in *Counselman* itself that suggest the Court should proceed with caution before electing to extend its derivative evidence prohibition to other circumstances.

2. Even if we are wrong in our analysis of the scope of the self-incrimination clause in this context, it does not follow that evidence to which law enforcement officers were led as a result of statements obtained without prior *Miranda* warnings must be excluded. While *Miranda* may have extended the protection of the self-incrimination privilege to informal custodial interrogation, it does not follow that a statement elicited without the *Miranda* warnings has thereby actually been obtained in violation of the privilege against self-incrimination. Our reading of the purpose of those warnings leads us to the conclusion that they were viewed by this Court not as part of the constitutional

mandate itself, but as a pragmatic device to help insure that the privilege is not violated; the exclusionary rule of *Miranda*, in turn, is the means by which compliance with its prophylactic procedural rule is enforced. Since, therefore, the interrogation of respondent violated these procedural rules rather than, directly, his constitutional privilege, the Fourth Amendment exclusionary rule suppressing fruits of a direct constitutional violation (e.g., *Wong Sun v. United States*, 371 U.S. 471) need not be applied.

Moreover, one of the principal considerations underlying the extension of the privilege against self-incrimination to custodial interrogation was to "guard against the possibility of unreliable statements" (*Johnson v. New Jersey*, 384 U.S. 719, 730). That factor is totally absent when statements made by an accused are not admitted and all that is at issue is the admissibility of derivative evidence, which still must be connected independently to the defendant.

Furthermore, it is unlikely that the limitation on the exclusionary rule which we here urge will have any significant impact on its efficacy in compelling compliance with the *Miranda* procedural requirements. Available empirical evidence suggests that the *Miranda* warnings have not had a substantial impact on the decision of suspects to respond to questions. In these circumstances, it is hardly likely that law enforcement officers will risk losing a confession in the speculative hope of enhancing their ability to obtain leads to other evidence, which still must be connected independently to the defendant. This is particularly true when the "derivative evidence" is a

live witness whom the law enforcement officers can never be certain will agree to provide a complete or truthful version of the events. Indeed, in the instant case, the full warnings were not given because *Miranda* had not been decided when the interrogation took place, and the defendant gave the police the name of a person he hoped would be an alibi witness. There was no guarantee that this witness would not have completely corroborated his story.

Moreover, where the "derivative evidence" is a live witness it can never be known with any degree of certainty whether or not he would have come forward or have been discovered anyway, even without the statement of the defendant. While in other contexts a full blown pre-trial hearing on this issue might be appropriate, where, as here, there has been no clear violation of the self-incrimination clause, and where the failure to exclude the evidence will have no effect on the deterrent efficacy of the *Miranda* exclusionary rule, the witness should be permitted to testify without engrafting yet another pre-trial "trial" on the criminal process.

Finally, it is clear from cases such as *Harris v. New York*, 401 U.S. 222, that the *Miranda* exclusionary rule is not absolute and all-pervasive. What is entailed in the decision whether to extend the rule to evidence that may be deemed the "fruit" of a violation of the *Miranda* procedural rules is a balancing of the various interests at stake. We submit that, in this case, the balance should be struck in favor of admissibility.<sup>3</sup>

<sup>3</sup> The issue presented by the State (Pet. 2), is concerned specifically with "derivative use" of the testimony of a live

## ARGUMENT

## I

THE PRIVILEGE AGAINST SELF-INCRIMINATION IS NOT VIOLATED BY CUSTODIAL INTERROGATION WHICH ELICITS STATEMENTS THAT ARE NOT ADMITTED AT TRIAL, BUT LEAD TO THE DISCOVERY OF OTHER EVIDENCE

Respondent made a statement to the police after having received a warning of rights that did not fully comply with the requirements of *Miranda v. Arizona*, 384 U.S. 436. That statement was not introduced in evidence against him at his subsequent trial, and it seems clear that it could not have been introduced without at least a partial overruling of *Miranda* or of *Johnson v. New Jersey*, 384 U.S. 719, which held *Miranda* applicable to all trials occurring, as respondent's did, after the date of the *Miranda* decision. However, as a result of their investigation of the accuracy of respondent's exculpatory explanation of the damaging evidence that he was badly scratched, the police questioned witness Henderson and learned from him of damaging admissions that respondent had made. The testimony of Henderson regarding

witness, and this case could be decided on that ground alone (see pp. 36-38, *infra*). Our argument is, however, principally addressed to the broader question of derivative use of any kind of evidence, inanimate as well as animate. We view this approach as appropriate because we deem an analysis of the general question of derivative use to be essential to a consideration of live witness testimony. We believe that the principal considerations that dictate reversal of the judgment of the court of appeals apply with full force to all types of derivative evidence.

these admissions was used at the trial, and the conformity of that use to the requirements of the Fifth Amendment and of the *Miranda* decision are at issue here.

The issue presented in the instant case was not ruled upon in the otherwise comprehensive *Miranda* decision, and *Miranda* need not be overruled or modified in any of its holdings in order to sustain the constitutionality of respondent's conviction (see pp. 42-44, *infra*). Broadly viewed, the essential issue here presented is whether the holding of *Counselman v. Hitchcock*, 142 U.S. 547, should be extended to apply to the context of informal custodial police interrogation. *Counselman* held that a claim of the privilege against self-incrimination asserted in resisting the giving of compelled (under threat of imprisonment for contempt) sworn testimony before a grand jury may not be overridden by a statutory grant of immunity limited to testimonial use of the compelled statements and not protecting against derivative use of such compelled testimony. We submit that *Counselman* should not be extended to cover the materially different situation here involved.

Our contention is based principally on the fact that few if any of the policies heretofore recognized by this Court to underlie the privilege against self-incrimination are adversely implicated by informal custodial interrogation of which only derivative use is made (provided, of course, that the statements are not secured through the kind of offensive police conduct recognized prior to *Miranda* as vitiating the admissibility

and voluntariness of a confession). These non-implicated policies include at least two that are operative in the *Counselman* situation (see pp. 16, 17-18, *infra*), thus providing a sound basis for differentiating the present case from *Counselman*. Moreover, apart from the analytic bases for distinction, we will show below that there are significant historical and analytical weaknesses in *Counselman* itself that suggest that the Court should proceed with caution before electing to extend its derivative evidence prohibition to other circumstances.

A. THE HOLDING OF *COUNSELMAN V. HITCHCOCK* SHOULD NOT BE EXTENDED TO DERIVATIVE USE OF STATEMENTS MADE DURING INFORMAL CUSTODIAL INTERROGATION

The circumstances which prompted the adoption of the self-incrimination clause have been detailed in opinions of this Court and the writings of commentators.<sup>3</sup> Essentially, this history reveals that the privilege was aimed at the evils of the Inquisition and the Star Chamber. It was designed to prohibit the government from compelling incriminating testimony under oath. In a more refined sense, "[t]he distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling 'communications'

<sup>3</sup> See, e.g., *Ullmann v. United States*, 350 U.S. 422, 428; *Brown v. Walker*, 161 U.S. 591; *Quinn v. United States*, 349 U.S. 155, 161-162. See also Morgan, *The Privilege Against Self-Incrimination*, 34 Minn. L. Rev. 1-23 (1949); Levy, *Origins of the Fifth Amendment* (1968); VIII Wigmore, *Evidence*, § 2250, pp. 267-295 (McNaughton Rev. 1961); Friendly, *Benchmarks*, pp. 270-271 (1967).



or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it." *Schmerber v. California*, 384 U.S. 757, 764. And, of course, it is the introduction of a defendant's own testimony that is expressly proscribed by the Fifth Amendment's textual mandate that no person "shall be compelled in any criminal case to be a witness against himself." See *Murphy v. Waterfront Commission*, 378 U.S. 52, 75-76.

Against this background, if this Court were writing on a clean slate, it could be cogently argued that while compelled responses of an accused are "testimonial" and should accordingly be barred from use at trial,<sup>4</sup> leads derived therefrom, which are not in and of themselves the "testimonial" statements of the accused, should be held to be outside the protective scope of the self-incrimination clause. Indeed, at common law, at the time of the adoption of the Constitution, it was settled that the fruits of improperly obtained confessions were admissible at the trial of the accused. *The King v. Warickshall*, 1 Leach 263, 168 Eng. Rep. 234 (1783); *The*

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<sup>4</sup> Compare *Massiah v. United States*, 377 U.S. 201, 207: "We do not question that in this case, as in many cases, it was entirely proper to continue an investigation of the suspected criminal activities of the defendant and his alleged confederates, even though the defendant had already been indicted. All that we hold is that the defendant's own incriminating statements, obtained by federal agents under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against him at his trial" (emphasis in original).

*King v. Lockhart*, 1 Leach 386, 168 Eng. Rep. 295 (1785).<sup>5</sup>

We recognize, however, that since the decision in 1892 in *Counselman v. Hitchcock*, 142 U.S. 547, it has been accepted in the United States that the privilege against self-incrimination protects a person from being compelled (under threat of contempt) to give testimony before a grand jury, if the testimony could be used directly to convict him of a crime or if it could lead to the discovery of other evidence which may be used to convict him. Since *Miranda* holds, in considering the admissibility of the statements themselves, that statements made during informal custodial interrogation are presumptively to be deemed compelled unless preceded by the full warnings prescribed in that decision and a clear, knowing, affirmative waiver of rights, the combination of *Miranda* and *Counselman* would appear, in dry logic, to catalyze a Fifth Amendment prohibition against derivative use of such statements (rather than the more limited prohibition established in *Miranda* against the testimonial use of the statement itself).

On the other hand, as Judge Friendly has observed in his incisive essay on the *Miranda* decision, if the privilege "in Wigmore's phrases, guards against the employment of legal process 'to extract from the person's own lips an admission of guilt, which would thus

<sup>5</sup> "The courts have always assumed that the meaning of the constitutional [self-incrimination] clause is determined by the common law." Levy, *Origins of The Fifth Amendment*, p. 429 (1968).

take the place of other evidence' or to require him to produce documents or chattels wherein he assumes 'moral responsibility for truth telling,' inquiry designed to elicit unsworn answers leading to other culprits or to real evidence not in the suspect's possession but not themselves offered in evidence would not be covered; although a suspect's answers are indeed 'testimonial' insofar as they implicate him and would thus be banned as such, their use merely to find other evidence establishing his connection with the crime differs only by a shade from the permitted use for that purpose of his body or his blood."<sup>6</sup> Friendly, *Benchmarks*, p. 280 (1967).

Since, as Judge Friendly concludes, "th[is] case lies between what the state clearly may compel and what it clearly may not, a strong analytical argument can be made for an intermediate rule whereby although it cannot require the suspect to speak by punishment or force, the non-testimonial fruits of speech that is excludable only for failure to comply with the *Miranda* code could still be used" (*ibid.*). We urge the adoption of such an "intermediate rule" here.

Limitation of the *Miranda* prohibition to testimonial use of the statements themselves would not undermine to any significant degree the values reflected by the privilege against self-incrimination. These values were comprehensively catalogued by the Court in *Murphy v. Waterfront Commission*, *supra*, 378 U.S. at 55:

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<sup>6</sup> Judge Friendly was here alluding to the decision, rendered one week after *Miranda* in *Schmerber v. California*, 384 U.S. 757.

The privilege against self-incrimination "registers an important advance in the development of our liberty—'one of the great landmarks in man's struggle to make himself civilized.'" *Ullmann v. United States*, 350 U.S. 422, 426. It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load," 8 Wigmore, *Evidence* (McNaughton rev., 1961), 317; our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life," *United States v. Grunewald*, 233 F. 2d 556, 581-582 (Frank, J., dissenting), rev'd 353 U.S. 391; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent." *Quinn v. United States*, 349 U.S. 155, 162. [Footnote omitted.]

The informal custodial interrogation at issue here—which involved use neither of "third degree" techniques nor of any other tactics that would render a

confession involuntary under traditional standards—does not to any significant degree implicate these important policy considerations:

1. *The "cruel trilemma"*

Perhaps the most significant analytic distinction between the instant case and the *Counselman* context is that respondent, had he chosen to remain silent or (as he in fact did) make a false statement, was free to do so without exposure to the "cruel trilemma of self-accusation, perjury or contempt," the first of the values enumerated in *Murphy* as underlying the self-incrimination privilege. This vital difference supports a refusal to extend *Counselman* back from the courtroom, grand jury chamber, or legislative hearing room to the informal custodial interrogation context.

2. *Inhumane treatment*

This is a truly important concern, although whether it is actually native to the self-incrimination provision of the Fifth Amendment or has arrived there by a marriage with fundamental due process notions is a debatable proposition (see dissenting opinion of White, J., in *Miranda, supra*, 384 U.S. at 527-528). It is implicated neither in the present case nor in the *Counselman* situation, although the possibility of such abuses being perpetrated (and going undetected) is, while still somewhat remote, greater in the case of informal police interrogation than in more formal pro-

ceedings of the kind considered in *Counselman*.<sup>6a</sup> We do not believe, however, that the entirely appropriate aversion to such tactics warrants a *per se* rule which in effect presumes that such misconduct has occurred where, as here, it is palpably clear that the presumption does not correspond to reality.

### 3. *Privacy values*

Since there was compelling evidence pointing to the respondent's involvement in this brutal offense, and probable cause to justify his arrest, it cannot be urged seriously that his interrogation offends "our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him'" or unfairly infringes on his right "to a private enclave where he may lead a private life."<sup>7</sup> Such interrogation is again different from that involved in the grand jury proceeding in *Counselman*, or from interrogation by a legislative committee, where witnesses are required to appear without any showing of probable cause to believe they have committed an offense or that they have any relevant information to convey.

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<sup>6a</sup> We would agree that, on due process grounds, a comprehensive exclusionary principle, reaching fruits as well as statements themselves, is appropriate to deter such illegal and offensive police interrogation tactics.

<sup>7</sup> Cf. *In re Horowitz*, 482 F. 2d 72, 85 (C.A. 2), certiorari denied, 414 U.S. 867: "[N]o Supreme Court decision has upheld a Fifth Amendment claim predicated solely, or even primarily, on the basis of an invasion of privacy."

#### 4. Concern with unreliability of confessions

Finally, interrogation that leads only to other evidence, which still must be connected to the accused by independent evidence, cannot possibly lead to abuses which will undermine the "protection to the innocent" which the self-incrimination clause provides.<sup>8</sup> Likewise, since, we are not dealing with interrogation which will result in the admissibility of any statements made by a defendant, there need to be no concern about the trustworthiness of "self-deprecatory statements"<sup>9</sup> (here, of course, the statements were exculpatory). That this concern was critical to extension of the privilege against self-incrimination to custodial interrogation<sup>10</sup> is borne out by the discussion of the purpose

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<sup>8</sup> Professor Wigmore outlined these abuses in Section 2251 of his treatise (VIII Wigmore, *Evidence* (3d ed. 1940)):

"If there is a right to an answer,—that is to a confession of guilt. Thus the legitimate use grows into the unjust abuse; ultimately the innocent are jeopardized by the encroachments of a bad system. \* \* \* For the sake, then not of the guilty but of the innocent accused, and of conservative and healthy principles of judicial conduct, the privilege should be preserved."

<sup>9</sup> This concern was specifically alluded to in *Miranda*, *supra*, 384 U.S. at 455, n. 24.<sup>8</sup> Mr. Justice White in his dissent attributed the "underpinning" of the holding in *Miranda* to the majority's "deep-seated distrust of all confessions" (384 U.S. at 537). See also Friendly, *Benchmarks*, *supra*, at 281-282:

"No matter how many explanations are offered, there can be no real doubt that a prime motive for extending the privilege to out-of-court proceedings must have been the Court's belief that the traditional due process approach did not sufficiently protect against the truly dreadful risk of the false confession."

<sup>10</sup> At common law at the time of the adoption of the Constitution, informal interrogation (not under oath) was permitted

of the *Miranda* rule in *Johnson v. New Jersey*, *supra*, 384 U.S. at 729-730:

[The *Miranda* warnings] are designed in part to assure that the person who responds to interrogation while in custody does so with intelligent understanding of his right to remain silent and of the consequences which may flow from relinquishing it. In this respect the rulings secure scrupulous observance of the traditional principle, often quoted but rarely heeded to the full degree, that "the law will not suffer a prisoner to be made the deluded instrument of his own conviction." Thus while *Escobedo* and *Miranda* guard against the possibility of unreliable statements in every instance of in-custody interrogation, they encompass situations in which the danger is not necessarily as great as when the accused is subjected to overt and obvious coercion. [Footnote omitted.]

As Judge Friendly has observed (*Benchmarks*, *supra*, at 282):

Although many citizens devoted to the Bill of Rights may not agree that a "fair state-individual balance" requires the government "to shoulder the entire load" in the investigation as

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during the course of a criminal investigation, and confessions or admissions so obtained were admissible unless it was shown that they were coerced. Levy, *Origins of the Fifth Amendment*, pp. 325-332 (1968). As late as 1951, the Court left open the issue "[w]hether involuntary confessions are excluded from federal criminal trials on the ground of a violation of the Fifth Amendment's protection against self-incrimination, or from a rule that forced confessions are untrustworthy \* \* \*." *United States v. Carignan*, 342 U.S. 36, 41. See also Friendly, *Benchmarks*, *supra*, at 271, n. 24.



it does in the prosecution of crime, few will deny that one innocent man sent to his death or to a long prison term because of a false confession is one too many. There is thus good reason to impose a higher standard on the police before allowing them to use a confession of murder than a weapon bearing the confessor's fingerprints to which his confession has led; doubtlessly this is the reason why fruits of a confession "not blatantly coerced" are admitted in England, India, and Ceylon, countries on whose experience the *Miranda* opinion relied.

5. *The relative roles of the state and the individual in the investigation and prosecution of crime*

Of the values identified in *Murphy* as underlying the privilege against self-incrimination, the only ones even arguably implicated by a holding permitting custodial interrogation that leads to other evidence are the policy that "the government in its contest with the individual \* \* \* shoulder the entire load" and, to a very limited extent, our "preference for an accusatorial rather than an inquisitorial system." But, of course, it is by now well established that an individual may indeed be compelled, notwithstanding these values, to give evidence (albeit of a non-testimonial nature) that may assist law enforcement authorities in convicting him of a crime. See, *e.g.*, *Schmerber v. California*, 384 U.S. 757 (blood samples); *Gilbert v. California*, 388 U.S. 263 (handwriting exemplars); *United States v. Dionisio*, 410 U.S. 1 (voice exemplars). As this Court observed in *Schmerber*, "the privilege [against self-incrimination] has never been

given the full scope which the values it helps to protect suggest" (384 U.S. at 762).

Certainly interrogation which elicits leads to other evidence does not offend those values any more than the compulsory taking of blood samples, fingerprints, or voice exemplars, all of which may be compelled in an "attempt to discover evidence that might be used to prosecute [a defendant] for a criminal offense" (*id.* at 761). To quote again from *Benchmarks, supra*, (p. 282):

Although reception of fruits would indeed violate what have been called "theological" bases for the privilege, these are hopelessly inconsistent with *Schmerber*.

Finally, the non-extension of *Counselman* is supported by another distinction between informal custodial interrogation and the more formal context of grand jury or similar proceedings—a distinction which relates not so much to the values fostered by the privilege as to the preconditions for its invocation. In *Counselman* and similar situations, a formal, express assertion of the privilege is required before the testimony sought may be withheld. Even in coerced confession cases, the assertion of the privilege, although not formal or express, may readily be inferred from the need to use physical or psychological coercion to elicit a statement. In *Miranda*, for the first time, the Court abandoned the requirement that some reasonably clear demonstration of unwillingness to speak precede the draping of the protective cloak of the privilege (*United States ex rel. Vajtauer v. Commissioner*

of *Immigration*, 273 U.S. 103, 113);<sup>11</sup> it substituted instead, for cases of informal custodial interrogation, an irrebuttable presumption that the privilege has been asserted and overborne whenever the statement has not been preceded by the full warning of rights and an express waiver. We do not here question the validity of the considerations that motivated the Court's "waiver" of the requirement that there be actual compulsion overcoming a perceptible assertion of the privilege (express or reasonably inferable) in order for the constitutional protection to accrue. We do, however, suggest that those considerations are not significantly implicated by custodial interrogation that results in responses which, although they may lead to other evidence, are not admitted at trial.

We emphasize again that the "intermediate rule" which we advocate is limited solely to informal custodial interrogation which involves neither third degree tactics nor other forms of interrogation that would render any statement involuntary under the traditional test. It applies only where, as here, the informal custodial interrogation standing alone is not regarded as an activity that society has any interest deterring.<sup>12</sup> (Indeed, there may be occasions where there is compelling interest in such interrogation, such as where it is directed to the discovery and termina-

<sup>11</sup> The necessity for such an assertion of the privilege was recently reaffirmed in *United States v. Kordel*, 397 U.S. 1.

<sup>12</sup> The distinction was noted by Chief Justice Traynor in a

tion of an ongoing criminal activity such as a kidnapping or extortion.) It is in these circumstances that so few—if any—of the values reflected by the self-incrimination clause are implicated.

B. THE COUNSELMAN DECISION ITSELF OFFERS A WEAK FOUNDATION FOR EXTENSION OF THE PRIVILEGE IN OTHER CONTEXTS TO ENCOMPASS DERIVATIVE EVIDENCE.

*Counselman v. Hitchcock* held that a "witness is protected 'from being compelled to disclose the circumstances of his offence, the sources from which, or the means by which, evidence of its commission, or of his connection with it, may be obtained, or made effectual for his connection, without using his answers as direct admissions against him'" (142 U.S. at 585). We have shown in the preceding discussion that the instant case is distinguishable from *Counselman* and other cases in which witnesses have been subpoenaed to appear before an inquisitorial body such as a grand jury or a legislative committee. But even if the Court should disagree with that analysis, *Counselman* should not be extended beyond the type of case with which it specifically dealt without a fresh consideration of the valid—somewhat different context in *People v. Varnum*, 59 Cal. Repr. 108, 427 P. 2d 772, 776:

"Unlike unreasonable searches and seizures, which always violate the Constitution, there is nothing unlawful in questioning an unwarned suspect so long as the police refrain from physically and psychologically coercive tactics condemned by due process and do not use against the suspect any evidence obtained."

ity of its holding. Cf. *Grosso v. United States*, 390 U.S. 62, 76 (Stewart, J., concurring). The rationale upon which the *Counselman* holding rests, it is respectfully submitted, is simply inadequate to support the broad reading of the scope of the self-incrimination clause there announced. And, indeed, the dictum in *Counselman* that only transactional immunity can overcome a claim of privilege has already been overruled. *Kastigar v. United States*, 406 U.S. 441.

Although the holding in *Counselman* regarding the scope of the privilege against self-incrimination has been cited on repeated occasions,<sup>13</sup> that holding was supported by little in the way of persuasive authority or analysis. Initially, the opinion in *Counselman* engaged in an exhaustive but inconclusive analysis of state court holdings. All that this established was that those state courts that had construed constitutional provisions worded in language not significantly different from the Fifth Amendment had held that limited use immunity (of the kind afforded by the Act of Congress held unconstitutional in *Counselman*) would suffice to overcome the claim of privilege,<sup>14</sup> whereas those

<sup>13</sup> See, e.g., *Kastigar v. United States*, 406 U.S. 441, 454; *Murphy v. Waterfront Commission*, 378 U.S. 52, 78-79.

<sup>14</sup> An example of such a case is *People ex rel. Hackley v. Kelly*, 24 N.Y. 74, 83-84, where it was held:

"If a man cannot give evidence upon the trial of another person without disclosing circumstances which will make his own guilt apparent or at least capable of proof, though his account of the transactions should never be used as evidence, it is the misfortune of his condition and not any want of humanity in the law. If a witness objects to a question on the ground that an answer would criminate himself, he must allege, in substance, that his answer, if repeated as his admission on his

state courts that had construed constitutional provisions providing protection to a witness against being compelled to "accuse or furnish evidence against himself" (rather than simply affording a privilege against being compelled to be a witness against one's self), held that a limited use immunity statute was insufficient.<sup>15</sup>

own trial, would tend to prove him guilty of a criminal offence. If the case is so situated that a repetition of it on a prosecution against him is impossible, as where it is forbidden by a positive statute, I have seen no authority which holds or intimates that the witness is privileged. It is not within any reasonable construction of the language of the constitutional provision."

<sup>15</sup> An example of such a holding is *Emery's Case*, 107 Mass. 172, 182, in which it was held:

"The third branch of the provision in the Constitution of Massachusetts, 'or furnish evidence against himself,' must be equally extensive in its application: and, in its interpretation, may be presumed to be intended to add something to the significance of that which precedes. Aside from this consideration, and upon the language of the proposition standing by itself, it is a reasonable construction to hold that it protects a person from being compelled to disclose the circumstances of his offence, the sources from which, or the means by which evidence of its commission, or of his connection with it, may be obtained, or made effectual for his conviction, without using his answers as direct admissions against him. For all practical purposes, such disclosures would have the effect to furnish evidence against the party making them. They might furnish the only means of discovering the names of those who could give evidence concerning the transaction, the instrument by which a crime was perpetrated, or even the *corpus delicti* itself.

"Both the reason upon which the rule is founded, and the terms in which it is expressed, forbid that it should be limited to confessions of guilt, or statements which may be proved, in subsequent prosecutions, as admissions of facts sought to be established therein."

After reviewing these cases, Mr. Justice Blatchford wrote (142 U.S. at 584-585):

But, as the manifest purpose of the constitutional provisions, both of the States and of the United States, is to prohibit the compelling of testimony of a self-eliminating kind from a party or a witness, the liberal construction which must be placed upon constitutional provisions for the protection of personal rights would seem to require that the constitutional guaranties, however differently worded, should have as far as possible the same interpretation; and that where the constitution, as in the cases of Massachusetts and New Hampshire, declares that the subject shall not be "compelled to accuse or furnish evidence against himself," such a provision should not have a different interpretation from that which belongs to constitutions like those of the United States and of New York, which declare that no person shall be "compelled in any criminal case to be a witness against himself."

Having thus announced the necessity for a rule of uniformity,<sup>16</sup> the opinion in *Counselman* states (*id.* at 585):

Under the rulings above referred to, by Chief Justice Marshall and by this court, and those in Massachusetts, New Hampshire, and Virginia, the judgment of the Circuit Court in the present case cannot be sustained. It is a reasonable construction, we think, of the

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<sup>16</sup> Since the self-incrimination clause of the Fifth Amendment was not then binding on the states, it is difficult to understand this reliance upon a desire for uniformity.

constitutional provision, that the witness is protected "from being compelled to disclose the circumstances of his offence, the sources from which, or the means by which, evidence of its commission, or of his connection with it, may be obtained, or made effectual for his connection, without using his answers as direct admissions against him." *Emery's Case*, 107 Mass. 172, 182.

This reasoning would be open to serious question even in a traditional Fifth Amendment context. The holding of the state cases, and particularly *Emery's Case*, may be distinguished by the peculiar language of the self-incrimination provisions there in issue. Moreover, *Boyd v. United States*, 116 U.S. 616, which was the opinion "of this court" to which the opinion in *Counselman* referred, set out the since discredited "mere evidence" rule and rested to a substantial degree on the notion that such evidence could not even be obtained pursuant to a search warrant, which involves no compulsion on the individual to speak. There is little in *Boyd* which survives today to support the holding in *Counselman v. Hitchcock*.<sup>17</sup>

The opinion of Chief Justice Marshall in *United States v. Burr*, 25 Fed. Cas. 38, to which *Counselman* also referred, stands only for the proposition that a witness may not be compelled to give testimony which

<sup>17</sup> *Boyd* still stands as authority for the holding that the privilege against self-incrimination may be asserted in response to a subpoena to produce private books and records. But that is because, by responding to a subpoena, the individual would in effect be admitting that the documents are his. See *Schmerber v. California*, 384 U.S. 757, 763-764.



is by itself sufficient to convict *or* which would form a "link" in the "chain of *testimony* which is necessary to convict any individual of a crime" (*id.* at 40; emphasis added). Counsel for the United States had argued in *Burr* that "a witness can never refuse to answer any question unless that answer, unconnected with other testimony, would be sufficient to convict him of a crime." Rejecting that argument, Chief Justice Marshall stated (*ibid.*):

This would be rendering the rule almost perfectly worthless. Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible but a probable case that a witness, by disclosing a single fact, may complete the testimony against himself, and to every effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. That fact of itself might be unavailing, but all other facts without it would be insufficient. While that remains concealed within his own bosom he is safe; but draw it from thence, and he is exposed to a prosecution. The rule which declares that no man is compellable to accuse himself would most obviously be infringed by compelling a witness to disclose a fact of this description.

Since, at the time of Chief Justice Marshall's ruling, there was no statute on the books conferring immunity from subsequent admission in evidence against the wit-

ness of the testimony itself, this statement cannot be read to provide support for the broader holding in *Counselman* that even if the statement is not admitted at all, the witness is privileged to refuse to answer a question if his responses might lead to other evidence.

Under these circumstances, it is not surprising that *Counselman* has been severely criticized as an aberration occasioned by peculiar phrases in state constitutions and not compelled by the self-incrimination clause itself (Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause*, 29 Mich. L. Rev. 1, 205-206 (1930)), and that its holding that only transactional immunity will suffice to overcome a claim of privilege has been overruled. *Kastigar v. United States*, 406 U.S. 441.

While the rationale of *Counselman* is no longer strong enough to support the holding,<sup>18</sup> a new line of authority exemplified by *Schmerber v. California*, 384 U.S. 757,<sup>19</sup>

<sup>18</sup> We are not suggesting that no rational basis can be advanced for the holding in *Counselman*, simply that none really was in that opinion. Certainly it is well within the legitimate province of this Court to determine, upon a consideration of the values underlying the constitutional policy regarding compelled self-incrimination, that distaste for the "cruel trilemma" adverted to in *Murphy v. Waterfront Commission*, *supra*, is a consideration of sufficient magnitude to outweigh the interest of society in making limited (derivative) use of evidence thereby obtained. But such a conclusion should be based on candid consideration of the conflicting values at stake in the inquiry. As previously discussed, it does not appear to us that those values can properly be deemed to dictate a conclusion that the privilege forbids derivative use of statements obtained by informal custodial interrogation.

<sup>19</sup> See also *United States v. Dionisio*, 410 U.S. 1; *United States v. Mara*, 410 U.S. 19; *California v. Byers*, 402 U.S. 424.

has evolved. Such cases permit the compulsory production of evidence such as blood samples, fingerprints, and voice exemplars in "an attempt to discover evidence that might be used to prosecute him for a criminal offense" (*id.* at 761).<sup>20</sup> There is a marked tension, to say the least, between the rationale of *Schmerber* and its progeny, and the holding of *Counselman* that the self-incrimination clause is offended if an individual is "compelled"<sup>21</sup> to make statements in "an attempt to discover evidence that might be used to prosecute him for a criminal offense." As Judge Friendly has written (*Benchmarks, supra*, at 277):

What is so difficult to reconcile from the standpoint of an ordered society is the uncompromising rigidity concerning what can be taken from a man's mouth in the form of speech with this commonsensible view concerning what can be taken from it in the form of saliva.

We hasten to reemphasize that there is no occasion in this case to reconsider the holding in *Counselman*, because the facts here are plainly distinguishable. We have treated the issue at some length only to demonstrate that, whatever vitality the holding still retains, it should not be extended.

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<sup>20</sup> See also *California v. Byers*, 402 U.S. 424, where, in sustaining the constitutionality of a "hit and run" accident report statute against a Fifth Amendment challenge, Chief Justice Burger stated (402 U.S. at 434):

"Although identity, when made known, may lead to inquiry that in turn leads to arrest and charge, those developments depend on different factors and independent evidence."

<sup>21</sup> In using the word "compelled" we emphasize that we are not referring to compulsion by techniques of physical or psychological coercion which would violate the due process requirement.

## II

EVEN IF THE SELF-INCRIMINATION CLAUSE PROTECTS AGAINST CUSTODIAL INTERROGATION WHICH LEADS TO OTHER EVIDENCE, THE FAILURE TO COMPLY WITH *MIRANDA* SHOULD NOT COMPEL THE SUPPRESSION OF SUCH EVIDENCE

1. In the preceding argument we have contended that, in the context of informal custodial interrogation, the privilege against self-incrimination is not a bar to interrogation which elicits statements that lead to other evidence, provided the statements themselves are not admitted at the trial of the accused. If we are wrong in our analysis of the scope of the self-incrimination clause, and if our submission regarding the extension of *Counselman* to informal custodial interrogation is rejected, it does not follow that the exclusionary principle applied in *Miranda* to the statements themselves must be applied equally to derivative evidence discovered through investigation of statements taken without full compliance with *Miranda*. Our submission is based on our understanding of the scope of the holding of *Miranda* and the purpose of the four-fold warning.

We do not believe that the Court intended the requirements enunciated in *Miranda* to be considered indispensable constituents of the privilege against self-incrimination itself. Rather, this Court simply set new standards governing the admissibility of statements made by accused persons during custodial interrogation. Without abandoning the premise that a statement voluntarily made is admissible at trial, the Court instituted a presumption of involuntariness where the suspect makes a statement without first

having been fully advised of his right to counsel and his right to remain silent. The critical concern of the Court was the dangers inherent in "incommunicado" interrogation. 384 U.S. at 445. Upon exhaustive analysis of commonly employed investigatory techniques, it found that, despite all official efforts at reform, sophisticated police practices, primarily psychological in nature, were still being employed to extract confessions. *Id.* at 445-454.

Moreover, in discussing confessions obtained in incommunicado, police-dominated atmospheres, the Court pointedly noted: "In these cases, we might not find the defendants' statements to have been involuntary in traditional terms. Our concern for adequate safeguards to protect precious Fifth Amendment rights is, of course, not lessened in the slightest. In each of the cases, the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures. The potentiality for compulsion is forcefully apparent \* \* \*" (*id.* at 457).

As the Court thereafter phrased it in *Johnson v. New Jersey*, *supra*, 384 U.S. at 729-730:

Our opinion in *Miranda* makes it clear that the prime purpose of these rulings is to guarantee full effectuation of the privilege against self-incrimination, the mainstay of our adversary system of criminal justice. \* \* \* They are designed in part to assure that the person who responds to interrogation while in custody does so with intelligent understanding of his right to remain silent and of the consequences which may flow from relinquishing it. In this respect the rulings secure scrupulous observance of the

traditional principle, often quoted but rarely heeded to the full degree, that "the law will not suffer a prisoner to be made the deluded instrument of his own conviction." Thus while *Escobedo* and *Miranda* guard against the possibility of unreliable statements in every instance of in-custody interrogation, they encompass situations in which the danger is not necessarily as great as when the accused is subjected to overt and obvious coercion.

Of course, as we have previously shown, where evidence sought to be suppressed is not the confession or statement but other evidence obtained as a result, there is no danger that the defendant will be convicted on the basis of his own suspect confession.

Equally significant to our present argument is the implicit recognition of the Court that not every statement obtained without the *Miranda* warnings suffers from such a defect or can reasonably be said to have been in fact compelled in violation of the self-incrimination clause. An absolute rule mandating the exclusion of statements obtained without the warnings was deemed necessary because of the apparent practical difficulties in determining whether, in a given case, the self-incrimination clause has been violated.<sup>22</sup>

<sup>22</sup> As respondent observes (Br. 30):

"The system which has developed operates in secret, without courtroom safeguards or a record being made, and with judicial review highly limited. Even when conducted without overt pressure, the balance in interrogation is weighted heavily in favor of the interrogator."

See also *Miranda v. Arizona*, *supra*, 384 U.S. at 445:

"The difficulty in depicting what transpires at such interrogations stems from the fact that in this country they have largely taken place incommunicado."

As an exclusionary rule designed to compel compliance with a pragmatic procedural rule not itself mandated by the Constitution but rather intended to assure that the self-incrimination clause is not violated, the *Miranda* exclusionary rule is significantly different from other exclusionary rules designed to deter conduct "which always violate[s] the Constitution." *People v. Varnum*, *supra* 427 P.2d at 776 (Traynor, J.).

Under these circumstances—given the absence of any concern regarding the credibility of "self-deprecatory statements" and the fact that it is at best speculative whether the statement made by respondent was in fact taken in violation of his privilege against compelled self-incrimination—respondent has failed to overcome the burden of justifying the exclusion of highly relevant evidence, not consisting of statements obtained from his lips, which establishes his complicity in a brutal crime. As Mr. Justice Frankfurter observed in *Nardone v. United States*, 308 U.S. 338, 340, "[a]ny claim for the exclusion of evidence logically relevant in criminal prosecutions is heavily handicapped. It must be justified by an over-riding public policy expressed in the Constitution or the law of the land." No such justification has been demonstrated here.

2. These considerations aside, we note that, even where an exclusionary rule is otherwise justified, such a rule is generally "restricted to those areas where its remedial objectives are thought most efficaciously served." *United States v. Calandra*, No. 73-734, decided January 8, 1974, slip op. p. 10. This determina-



tion necessarily involves a "balancing process" in which the likelihood of deterrence is weighed against the damage done to our system of justice by the exclusion of relevant evidence (*ibid.*).

It seems reasonably clear, based on empirical evidence, that the extension of the exclusionary rule to the fruits of a statement taken without compliance with *Miranda* is not likely to undermine the deterrent effect of the exclusionary rule. If studies which have shown that the giving of *Miranda* warnings has had little effect on the decisions of most criminal defendants to speak<sup>23</sup> are correct, it is unlikely that law enforcement officers will risk losing the use of a full confession in the speculative hope of obtaining derivative evidence (which they will still have to connect to the defendant by evidence independent of his statement).<sup>24</sup>

<sup>23</sup> Note, *Interrogations in New Haven: The Impact of Miranda*, 76 Yale L. J. 1519 (1967); Griffiths & Ayres, *A Postscript to the Miranda Project: Interrogation of Draft Protesters*, 77 Yale L. J. 300 (1967); Seeburger & Wettick, *Miranda in Pittsburgh—A Statistical Study*, 29 U. Pitt. L. Rev. 1 (1967); Medalie, Zeitz & Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda*, 66 Mich. L. Rev. 1347 (1968); Driver, *Confessions and the Social Psychology of Coercion*, 82 Harv. L. Rev. 42 (1968).

<sup>24</sup> There is one type of situation where such interrogation would be worth the risk, and that is where there is a paramount interest in interrupting an ongoing, serious criminal activity—for example where one of several kidnappers is apprehended and asked for the location of the place where the victim is held. In that situation, we respectfully question the policy of deterring interrogation which is not otherwise offensive. And if we accept the notion that such interrogation is not constitutionally foreclosed, it would seem strange to hold that, after such a suspect disclosed the hiding place, the victim could not identify



Indeed, the cases in which the *Miranda* warnings are not fully given usually involve interrogation under circumstances where it is uncertain that the warnings are required (*United States v. Castellana*, C.A. 5, No. 73-2259, decided January 17, 1974) or where law enforcement officers are simply careless in administering all of the warnings (*United States v. Carneglia*, 468 F.2d 1084 (C.A. 2)), or in cases such as the instant case, where the interrogation took place prior to *Miranda*. Manifestly, in such cases, an exclusionary rule applicable to "fruits" can have little if any deterrent value.

Under these circumstances, it is respectfully submitted there is no justification for extending the exclusionary rule to fruits of statements obtained without full compliance with *Miranda's* procedural rules.

3. The foregoing discussion has been directed to "fruits" generally, without distinguishing between inanimate derivative evidence and live witnesses. What we have said above regarding the likelihood that law enforcement officers would risk losing a full confession in hope of obtaining tangible evidence applies with even greater force when the "fruit" is a live witness, for in such a situation there is no guarantee that, even if the witness has relevant information, he will willingly make full or truthful disclosure. As Chief Justice (then Judge) Burger has observed:

[T]he living witness is an individual human personality whose attributes of will, perception,

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him as one of the kidnappers, or that his fingerprints found at that location could not be introduced in evidence. Yet this is the import of the holding below.

memory and volition interact to determine what testimony he will give. The uniqueness of this human process distinguishes the evidentiary character of a witness from the relative immutability of inanimate evidence. [*Smith v. United States*, 324 F.2d 879, 881-882 (C.A.D.C.), certiorari denied, 377 U.S. 954.]

Moreover, where the "derivative evidence" is a live witness, it becomes more difficult to say with any certainty that the witness would not have been discovered "but for" the allegedly improper conduct—i.e., that his testimony is in fact "derived" from the improperly obtained statement. Accordingly, some courts of appeals have adopted a case by case approach. As Chief Judge Bazelon wrote in *Smith v. United States*, 344 F.2d 545, 547 (C.A.D.C.), quoting *McLindon v. United States*, 329 F. 2d 238, 241, n. 2 (C.A.D.C.):

"In each case the court must determine how great a part the particular manifestation of 'individual human personality' played in the ultimate receipt of the testimony in question. Indications in the record that mere knowledge of the witness' identity would not inevitably guarantee that his testimony would be favorable to the prosecution; that the witness might eventually have voluntarily gone to the police even without their knowing his identity; that his testimony has remained unchanged from the start—all are relevant factors to be considered in determining the final outcome."

While it may be possible in some cases to conclude with assurance that such a witness would or would not have come forward or been discovered without the defendant's statement, or that the taint has or has not

been attenuated, we submit that, at least where, as here, the improper conduct did not itself violate the Constitution, and where the application of an exclusionary rule would not substantially affect the conduct of law enforcement officers, it is unnecessary to create yet another pre-trial "trial," the outcome of which is dependent on a difficult assessment of the motivation of a particular witness. See *Harrison v. United States*, 392 U.S. 219, 224-225.<sup>23</sup> Such a witness should be permitted to give his testimony at trial unless the conduct which led to his discovery is offensive to due process values, so that no possible dilution of the deterrent efficacy of the exclusionary rule should be sanctioned.

4. We advocate no novel proposition. On the contrary, the position which we espouse is fully consonant with established principles of the western legal tradition and of the common law. England, for example, does not observe a rigid exclusionary rule with respect to unlawfully obtained evidence, but generally admits

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<sup>23</sup> In *Harrison v. United States*, 392 U.S. 219, 223, n. 9, a case in which it was held that the testimony of the defendant at his first trial was the fruit of an illegally obtained confession and therefore could not be introduced at his retrial (the confession was the product of interrogation undertaken after the defendant should have been but was not promptly arraigned), the Court specifically held: "We have no occasion in this case to canvass the complex and varied problems that arise when the trial testimony of a witness other than the accused is challenged as 'the evidentiary product of the poisoned tree.'"

We hasten to add that there is no occasion "to canvass the complex and varied problems" that would be posed by this question in a pure Fifth Amendment case. Compare *McManis v. Richardson*, 397 U.S. 759. For that is not the issue here. What is here involved is the implementation of the underlying purpose of the Amendment by mandatory warnings that this Court found necessary to adopt in *Miranda*.

all reliable, relevant evidence, however obtained, subject to the discretion of the trial judge to exclude evidence gathered in a manner thought to be "unfair" to the defendant, as, for example, by trick. *Kuruma v. The Queen*, [1955] A.C. 197, 203-204 (P.C.), [1955] 1 All Eng. Rep. 236 (Kenya).

With respect to statements of a defendant, the traditional standard of admissibility in British courts is trustworthiness. Consequently, a confession induced by promises or threats is always inadmissible on the theory that an involuntary confession is unreliable. 2 East, *Pleas of the Crown* 657-658 (1803). Moreover, under modern practice, judges have discretion on grounds of fairness and prejudice to exclude any statement made by a defendant when he has not been advised of his rights during a police interrogation. Gotlieb, *Confirmation by Subsequent Facts*, 72 L. Q. Rev. 209, 223-224 (1956); Archbold, *Criminal Pleading, Evidence and Practice*, § 1388 *et seq.* (38th ed.), and cases there cited.<sup>26</sup> However—and this is crucial—the English exclusionary rule is never extended to render inadmissible the fruits of statements unlawfully obtained. It has long been held that, even where a confession is plainly inadmissible, "anything that confession led to may be given in evidence." *The Queen v. Leatham*, 8 Cox Crim. Cas. 498, 503 (Q.B.) (1861) (Crompton, J.).

<sup>26</sup>The English procedural rules for custodial interrogation, known as the "Judges' Rules," were cited with approval in *Miranda, supra*, 384 U.S. at 486-488. Referring to these rules, the Court stated in part (*id.* at 488, n. 57): "[D]espite the fact [that] some discretion as to admissibility is invested in the trial judge, the Rules are a significant influence in the English criminal law enforcement system."

In the early case of *The King v. Warickshall*, 1 Leach 263, 168 Eng. Rep. 234 (1783), the defendant had made an inadmissible statement revealing where she had hidden certain stolen property and the property was found at the location so disclosed. The court rejected the defendant's contention that proof of that discovery should not have been given, holding that subsequent acts done in consequence of an inadmissible confession could properly be proved at trial.

A similar result was reached in *The King v. Lockhart*, 1 Leach 386, 168 Eng. Rep. 295 (1785). There, the defendant acknowledged under interrogation that he had stolen the property in question and stated that he had disposed of it to one Grant. At trial, the defendant asserted that, since his own statement could not be received in evidence, Grant's testimony was similarly incompetent. The court held: "[A]lthough a confession improperly obtained cannot be given in evidence, yet it can never go to the rejection of the evidence of other witnesses, which are got at in consequence of such a confession" (1 Leach at 387).

A recent statement of this rule is to be found in *Commissioners of Customs and Excise v. Harz*, [1967] A.C. 760, [1967] 1 All Eng. Rep. 177. There, the defendant was charged in a criminal case with the evasion of a purchase tax. During the course of the investigation, the defendant was advised erroneously that if he did not respond to questions put to him, he would be prosecuted for his failure to do so. The

admissions so elicited were introduced at his trial. The House of Lords held that a conviction obtained as a result of these admissions could not be upheld, since the statutory power of compulsion did not extend to these statements. Lord Reid said: "The appellants' first argument was that relevant evidence is always admissible, even where the prosecution obtained it by illegal means. There is authority to that effect where the evidence is real evidence—some object like a blood-stained knife which was only discovered because the accused was compelled by illegal means to say where it was hidden. But that has no application to confessions which for some three centuries have been held to be inadmissible unless they are free and voluntary" ([1967] A.C. at 817).

There is no indication of a present English trend to exclude evidence derived from inadmissible statements. On the contrary, there appears to be some pressure to admit even improperly obtained statements, if they are corroborated as a whole or in part by subsequently discovered facts. See Gotlieb, *supra*, 72 L.Q. Rev. at 209-210. The most recent case on the subject holds that reliability is the primary standard of admissibility, and that English law therefore permits the admission in evidence of information supplied by the defendant, if that information has led to the discovery of a relevant fact. Consequently, the derivative evidence is admissible, along with any part of the defendant's statement which it corroborates. *The*



*Queen v. Ramasamy*, [1965] A.C. 1, 12-15 (P.C.) (Ceylon).<sup>27</sup>

The key theme to be gleaned from these cases is that they renounce the "fruits" doctrine as an inexorable consequence of the rule excluding illegally obtained confessions or statements. We advocate no more when we urge that consideration of neither logic, history nor policy require any different rule where leads are obtained as a result of interrogations which may be voluntary but are nonetheless not conducted in full compliance with *Miranda*.

5. The analysis we urge here on constitutional and policy grounds is not foreclosed by the holding in *Miranda*. Although the opinion in *Miranda* expressly dealt with almost every aspect of the issues raised by statements made during informal custodial interrogation—including such matters as the admissibility of exculpatory statements (384 U.S. at 477) and the admissibility of "circumstantial evidence" to show that the defendant was aware of rights even though not expressly advised of them (*id.* at 471-472)—it did not allude to the fruit of the poisonous

<sup>27</sup> The Scottish and Irish courts follow exclusionary rules somewhat similar to the English rule, but those jurisdictions, like the United States, also recognize deterrence, as well as reliability, as a factor to be considered in adjudging the admissibility of evidence. See *Lawrie v. Muir*, 1950 Scots L.T.R. 37, 40. Accordingly, various tests are considered in determining the use of improperly obtained evidence, among them whether the irregularity was merely technical or constituted a serious invasion of the defendant's rights. See, e.g., *H. M. Advocate v. Turnbull*, 1951 Scots L.T.R. 409; *People v. O'Brien*, [1965] Ir. R. 142; Heydon, *Illegally Obtained Evidence* (1), 1973 Crim. L. Rev. 603, 608.

tree doctrine. On the contrary, the Court made clear in the opening paragraph of its opinion that it was "deal[ing] with *the admissibility of statements* obtained from an individual who is subjected to custodial police interrogation \* \* \*" (*id.* at 4439; emphasis added.)<sup>28</sup>

Later guidelines offered by this Court, moreover, support our submission that the *Miranda* exclusionary rule is not absolute and all-embracing. In *Harris v. New York*, 401 U.S. 222, 224, the Court expressly cautioned that *Miranda* must not be read over-broadly to bar all uses of uncounseled statements, but that only the portions of the majority opinion necessary to the result are to be regarded as controlling.

<sup>28</sup> It is true that the *Miranda* majority stated, "unless and until \* \* \* warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against [the defendant]" (384 U.S. at 479; emphasis added). Two of the dissenters evidently feared the application of the "fruit of the poisonous tree" doctrine to *Miranda* violations. See 384 U.S. at 500 (Clark, J.); cf. 384 U.S. at 545 (White, J.). However, even if the quoted phrase in the majority opinion was intended to refer to derivative evidence, the statement must be considered dictum, since none of the *Miranda* cases involved the use of "fruits" of unlawfully obtained statements.

There has, moreover, been doubt among legal scholars that the Court could have intended in one casual sentence to dispose of the complex question of the scope of the exclusionary rule devised in the *Miranda* decision. Judge Friendly reads "evidence obtained as a result" to mean the statements made during an unlawful interrogation, rather than evidence derived from leads developed during a period of improper questioning. Friendly, *Benchmarks, supra*, at 279. See also George, *Interrogation of Criminal Defendants—Some Views on Miranda v. Arizona*, 35 Fordham L. Rev. 169, 193 (1966).



As the Court pertinently stated in *Harris* (*id.* at 224):

Some comments in the *Miranda* opinion can indeed be read as indicating a bar to use of an uncounseled statement for any purpose, but discussion of that issue was not at all necessary to the Court's holding and cannot be regarded as controlling. *Miranda* barred the prosecution from making its case with statements of an accused made while in custody prior to having or effectively waiving counsel. It does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards.

So here, there is no reason to question the truthworthiness of the testimony of the man respondent hoped would supply an alibi, who in any event was subject to full cross-examination at trial. See *Dutton v. Evans*, 400 U.S. 74; *California v. Green*, 399 U.S. 149; *Davis v. Alaska*, No. 72-5794, decided February 27, 1974.<sup>29</sup>

<sup>29</sup> We do not contend that the fruits of illegally obtained statements should never be excluded. When the *Miranda* violation consists of deliberate and flagrant abuse of the accused's constitutional rights, amounting to a denial of due process, application of the exclusionary principle would appear warranted. See *Friendly, Benchmarks, supra*, at 260-261, 282. However, where, as here, the *Miranda* violation is merely a technical one and no actual constitutional violation is alleged or proved by the defendant, exclusion of the statement alone is sufficient to serve the purposes of deterring illegal conduct and ensuring the trustworthiness of evidence for which the *Miranda* exclusionary rule was fashioned.

## CONCLUSION

The judgment of the court of appeals should therefore be reversed.

Respectfully submitted.

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MARCH 1974.

**MOTION**

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**No. 75-405**

**IN THE SUPREME COURT OF THE  
UNITED STATES**

**OCTOBER TERM, 1975**

**STATE OF MICHIGAN,  
*Petitioner,***

**vs.**

**THOMAS W. TUCKER,  
*Respondent.***

**On Writ of Certiorari to the United States Court of  
Appeals for the Sixth Circuit**

**MOTION OF WOMEN LAWYERS ASSOCIATION OF  
MICHIGAN FOR LEAVE TO FILE BRIEF AMICUS  
CURIAE IN SUPPORT OF RESPONDENT**

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**AMERICAN BUREAU AND BOOK  
CO. GRAND RAPIDS**

No. 73-482

**IN THE SUPREME COURT OF THE  
UNITED STATES**

OCTOBER TERM, 1973

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**STATE OF MICHIGAN,**  
*Petitioner,*

vs.

**THOMAS W. TUCKER,**  
*Respondent.*

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On Writ of Certiorari to the United States Court of  
Appeals for the Sixth Circuit

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**MOTION OF WOMEN LAWYERS ASSOCIATION OF  
MICHIGAN FOR LEAVE TO FILE BRIEF AMICUS  
CURIAE IN SUPPORT OF RESPONDENT**

Now comes the Women Lawyers Association of Michigan, by and through its attorneys Kathleen Copeland and Clarice Jobes, and moves this Honorable Court for an Order granting leave to submit a brief *amicus curiae* in support of Respondent in the above-captioned cause for the following reasons:

1. The Women Lawyers Association of Michigan is an unincorporated voluntary association of women attorneys licensed to practice in the State of Michigan. The Association is the sole association of women lawyers in Michigan and was founded in 1919. Its objects include advancing the interests of women members of the legal profession as well as advancing the position of women in general as they are affected by the law.

2. The Association has a special interest in the subject matter of the case at bar in that the brunt of protecting the legal rights of women, including women victims of crime, increasingly falls upon women attorneys. Correlatively, the Association has an equal interest in protecting and preserving the existing constitutional rights of all criminal defendants.

3. The defendant in this cause was charged with the crime of rape, an offense which is perpetrated on women, and with which the Association has great concern. Because of the brutality of the offense in this case, the Association seeks leave to submit a brief *amicus curiae*, believing that dispassionate review of the record is of supreme importance, as did Mr. Justice Clark in *Gallegos v. Colorado*, 370 US 49, 55, 83 S Ct 1209 (1962), when he quoted Chief Justice John Marshall:

“[i]f courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined.”

4. The Association has a strong interest in seeing that the protection of women victims of crime is not accomplished by depriving criminal defendants of constitutional guarantees. It believes that the guarantees set forth in *Miranda v. Arizona*, 384 US 436, 86 S Ct 1602 (1966), must continue to be applied to all criminal defendants equally, regardless of the nature of the crime they have committed. The Association concurs with Mr. Justice Harlan who has said:

“We do not release a criminal from jail because we like to do so, or because we think it wise to do so, but only because the government has offended constitutional principle in the conduct of his case.”

*Desist v. United States*, 394 US 244, 258, 89 S Ct 1030 (1968).

5. If such leave is granted, the Association joins with and adopts by reference the Brief of Civil Liberties Com-

mittee, State Bar of Michigan as Amici Curiae in Support of the Respondent.

**WHEREFORE**, the Women Lawyers Association of Michigan prays this Court:

A. Issue an Order Granting Leave to Submit a Brief Amicus Curiae in the above captioned cause.

B. Adopt by reference the Brief of Civil Liberties Committee, State Bar of Michigan as Amici Curiae brief of the Women Lawyers Association of Michigan in Support of the Respondent.

Respectfully Submitted,

(s) Kathleen Copeland

(s) Clarice Jobes

*Co-counsel, Women Lawyers  
Association of Michigan*





NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337.

# SUPREME COURT OF THE UNITED STATES

## Syllabus

### MICHIGAN v. TUCKER

#### CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 73-482. Argued March 20, 1974—Decided June 10, 1974

Respondent, who had been arrested for rape, was questioned by police. Before the commencement of the interrogation (which antedated this Court's decision in *Miranda v. Arizona*, 384 U. S. 436), respondent was advised of his right to remain silent and his right to counsel (but not of his right to the appointment of counsel). Respondent related an alibi that he was with a friend (Henderson), at the time of the crime, but the police later elicited from Henderson information tending to incriminate respondent. Before trial, respondent made a motion to exclude Henderson's expected testimony because respondent had revealed Henderson's identity without having received the full warnings mandated by the intervening *Miranda* decision. The motion was denied, Henderson testified, and respondent was convicted. Following affirmance on appeal, respondent sought habeas corpus relief, which the District Court granted, finding that Henderson's testimony was inadmissible because of the *Miranda* violation. The Court of Appeals affirmed. *Held*:

1. The police conduct in this case, though failing to afford respondent the full measure of procedural safeguards later set forth in *Miranda*, did not deprive respondent of his privilege against self-incrimination since the record clearly shows that respondent's statements during the police interrogation were not involuntary or the result of potential legal sanctions. Pp. 5-12.

2. The evidence derived from the police interrogation was admissible. Pp. 12-18.

(a) The police's pre-*Miranda* failure to advise respondent of his right to appointed counsel under all the circumstances of this case involved no bad faith and would not justify recourse to the

## Syllabus

exclusionary rule which is aimed at deterring willful or negligent deprivation of the accused's rights. Pp. 12-14.

(b) The failure to advise respondent of his right to appointed counsel had no bearing upon the reliability of Henderson's testimony, which was subjected to the normal testing process of an adversary trial. Pp. 14-15.

(c) The use of the testimony of a witness discovered by the police as a result of the accused's statements under these circumstances does not violate any requirements under the Fifth, Sixth, and Fourteenth Amendments, relating to the adversary system. Pp. 15-16.

480 F. 2d 927, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, and POWELL, JJ., joined. STEWART, J., filed a concurring opinion. BRENNAN, J., filed an opinion concurring in the judgment, in which MARSHALL, J., joined. WHITE, J., filed an opinion concurring in the judgment. DOUGLAS, J., filed a dissenting opinion.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

# SUPREME COURT OF THE UNITED STATES

No. 73-482

State of Michigan, Petitioner, v. Thomas W. Tucker.	}	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.
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[June 10, 1974]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

This case presents the question whether the testimony of a witness in respondent's state court trial for rape must be excluded simply because police had learned the identity of the witness by questioning respondent at a time when he was in custody as a suspect, but had not been advised that counsel would be appointed for him if he was indigent. The questioning took place before this Court's decision in *Miranda v. Arizona*, 384 U. S. 436 (1966), but respondent's trial, at which he was convicted, took place afterwards. Under the holding of *Johnson v. New Jersey*, 384 U. S. 719 (1966), therefore, *Miranda* is applicable to this case. The United States District Court for the Eastern District of Michigan reviewed petitioner's claim on a petition for habeas corpus and held that the testimony must be excluded.<sup>1</sup> The Court of Appeals affirmed.<sup>2</sup>

## I

On the morning of April 19, 1966, a 43-year-old woman in Pontiac, Michigan, was found in her home by a friend

<sup>1</sup> 352 F. Supp. 266 (1972).

<sup>2</sup> 480 F. 2d 927 (1973).

and coworker, Luther White, in serious condition. At the time she was found the woman was tied, gagged, and partially disrobed, and had been both raped and severely beaten. She was unable to tell White anything about her assault at that time and still remains unable to recollect what happened.

While White was attempting to get medical help for the victim and to call for the police, he observed a dog inside the house. This apparently attracted White's attention for he knew that the woman did not own a dog herself. Later, when talking with police officers, White observed the dog a second time, and police followed the dog to respondent's house. Neighbors further connected the dog with respondent.

The police then arrested respondent and brought him to the police station for questioning. Prior to the actual interrogation the police asked respondent whether he knew for what crime he had been arrested, whether he wanted an attorney, and whether he understood his constitutional rights.<sup>3</sup> Respondent replied that he did understand the crime for which he was arrested, that he did not want an attorney, and that he understood his rights.<sup>4</sup> The police further advised him that any statements he might make could be used against him at a later date in court.<sup>5</sup> The police, however, did not advise respondent that he would be furnished counsel free of charge if he could not pay for such services himself.

The police then questioned respondent about his activities on the night of the rape and assault. Respondent replied that during the general time period at issue he had first been with one Robert Henderson and then later at home, alone, asleep. The police sought to confirm this

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<sup>3</sup> Transcript of Preliminary Hearing, p. 99.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*, p. 99-100.

story by contacting Henderson, but Henderson's story served to discredit rather than to bolster respondent's account. Henderson acknowledged that respondent had been with him on the night of the crime but said that he had left at a relatively early time. Furthermore, Henderson told police that he saw respondent the following day and asked him at that time about scratches on his face—"asked him if he got hold of a wild one or something."<sup>6</sup> Respondent answered, "[S]omething like that."<sup>7</sup> Then, Henderson said, he asked respondent "[W]ho it was,"<sup>8</sup> and respondent said: "[S]ome woman lived the next block over,"<sup>9</sup> adding "She is a widow woman" or words to that effect.<sup>10</sup>

These events all occurred prior to the date on which this Court handed down its decision in *Miranda v. Arizona*, 384 U. S. 436 (1966), but respondent's trial occurred afterwards. Prior to trial respondent's appointed counsel made a motion to exclude Henderson's expected testimony because respondent had revealed Henderson's identity without having received full *Miranda* warnings. Although respondent's own statements taken during interrogation were excluded, the trial judge denied the motion to exclude Henderson's testimony. Henderson therefore testified at trial, and respondent was convicted of rape and sentenced to 20 to 40 years' imprisonment. His conviction was affirmed by both the Michigan Court of Appeals<sup>11</sup> and by the Michigan Supreme Court.<sup>12</sup>

Respondent then sought habeas corpus relief in federal district court. That court, noting that respondent had

<sup>6</sup> Transcript of Trial, p. 223.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*, p. 224.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> 19 Mich. App. 320, 172 N. W. 2d 712 (1969).

<sup>12</sup> 385 Mich. 594, 189 N. W. 2d 290 (1971).

not received the full *Miranda* warnings and that the police had stipulated Henderson's identity was learned only through respondent's answers, "reluctantly" concluded that Henderson's testimony could not be admitted.<sup>13</sup> Application of such an exclusionary rule was necessary, the court reasoned, to protect respondent's Fifth Amendment right against compulsory self-incrimination. The court therefore granted respondent's petition for a writ of habeas corpus unless petitioner retried respondent within 90 days. The Court of Appeals for the Sixth Circuit affirmed. We granted certiorari, — U. S. —, and now reverse.

## II

Although respondent's sole complaint is that the police failed to advise him that he would be given free counsel if unable to afford counsel himself, he did not, and does not now, base his arguments for relief on a right to counsel under the Sixth and Fourteenth Amendments. Nor was the right to counsel, as such, considered to be persuasive by either federal court below. We do not have a situation such as that presented in *Escobedo v. Illinois*, 378 U. S. 478 (1964), where the policemen interrogating the suspect had refused his repeated requests to see his lawyer who was then present at the police station. As we have noted previously, *Escobedo* is not to be broadly extended beyond the facts of that particular case. See *Johnson v. New Jersey*, 384 U. S. 719, 733-734 (1966); *Kirby v. Illinois*, 406 U. S. 682, 689 (1972); *Frazier v. Cupp*, 394 U. S. 731, 739 (1969). This case also falls outside the rationale of *Wade v. United States*, 388 U. S. 218, 224 (1967), where the Court held that counsel was needed at a post-indictment lineup in order to protect "the right to a fair trial at which the witnesses against [the defendant] might be meaningfully cross-examined." Hender-

<sup>13</sup> 352 F. Supp., at 268.

son was fully available for searching cross-examination at respondent's trial.

Respondent's argument, and the opinions of the District Court and Court of Appeals, instead rely upon the Fifth Amendment right against compulsory self-incrimination and the safeguards designed in *Miranda* to secure that right. In brief, the position urged upon this Court is that proper regard for the privilege against compulsory self-incrimination requires, with limited exceptions not applicable here, that all evidence derived solely from statements made without full *Miranda* warnings be excluded at a subsequent criminal trial. For purposes of analysis in this case we believe that the question thus presented is best examined in two separate parts. We will therefore first consider whether the police conduct complained of directly infringed upon respondent's right against compulsory self-incrimination or whether it instead violated only the prophylactic rules developed to protect that right. We will then consider whether the evidence derived from this interrogation must be excluded.

### III

The history of the Fifth Amendment right against compulsory self-incrimination, and the evils against which it was directed, have received considerable attention in the opinions of this Court. See, e. g., *Kastigar v. United States*, 406 U. S. 441 (1972); *Miranda v. Arizona*, *supra*; *Murphy v. Waterfront Commission*, 378 U. S. 52 (1964); *Ullmann v. United States*, 350 U. S. 422, 426 (1956); *Counselman v. Hitchcock*, 142 U. S. 547 (1892). At this point in our history virtually every schoolboy is familiar with the concept, if not the language, of the provision that reads: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." This Court's decisions have referred to the right as "the mainstay of our adversary system of criminal justice," *Johnson*

v. *New Jersey*, *supra*, at 729, and as "one of the great landmarks in man's struggle to make himself civilized." *Ullmann*, *supra*, at 426. It is not surprising that the constitution of virtually every State has a comparable provision. VIII Wigmore, *Evidence* (McNaughton rev. 1961), § 2252.

The importance of a right does not, by itself, determine its scope, and therefore we must continue to hark back to the historical origins of the privilege, particularly the evils at which it was to strike. The privilege against compulsory self-incrimination was developed by painful opposition to a course of ecclesiastical inquisitions and Star Chamber proceedings occurring several centuries ago. See Levy, *Origins of the Fifth Amendment*; Morgan, *The Privilege Against Self-Incrimination*, 34 *Minn. L. Rev.* 1 (1949); Wigmore, *Evidence* (McNaughton rev. 1961), § 2250. Certainly anyone who reads accounts of those investigations, which placed a premium on compelling subjects of the investigation to admit guilt from their own lips, cannot help but be sensitive to the framers' desire to protect citizens against such compulsion. As this Court has noted, the privilege against self-incrimination "was aimed at a . . . far-reaching evil—a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality." *Ullmann*, *supra*, at 428.

Where there has been genuine compulsion of testimony, the right has been given broad scope. Although the constitutional language in which the privilege is cast might be construed to apply only to situations in which the prosecution seeks to call a defendant to testify against himself at his criminal trial, its application has not been so limited. The right has been held applicable to proceedings before a grand jury, *Counselman v. Hitchcock*, 142 U. S. 547 (1892), to civil proceedings, *McCarthy v. Arndstein*, 266 U. S. 34 (1924), to congressional investigations, *Watkins v. United States*, 354 U. S. 178 (1957),



to juvenile proceedings, *In re Gault*, 387 U. S. 1 (1967), and to other statutory inquiries. *Malloy v. Hogan*, 378 U. S. 1 (1964). The privilege has also been applied against the States by virtue of the Fourteenth Amendment. *Malloy, supra*.

The natural concern which underlies many of these decisions is that an inability to protect the right at one stage of a proceeding may make its invocation useless at a later stage. For example, a defendant's right not to be compelled to testify against himself at his own trial might be practically nullified if the prosecution could previously have required him to give evidence against himself before a grand jury. Testimony obtained in civil suits, or before administrative or legislative committees, could also prove so incriminating that a person compelled to give such testimony might readily be convicted on the basis of those disclosures in a subsequent criminal proceeding.<sup>14</sup>

In more recent years this concern—that compelled disclosures might be used against a person at a later criminal trial—has been extended to cases involving police interrogation. Before *Miranda* the principal issue in these cases was not whether a defendant had waived his privilege against compulsory self-incrimination but simply whether his statement was "voluntary." In state cases the Court applied the Due Process Clause of the Fourteenth Amendment, examining the circumstances of interrogation to determine whether the processes were so unfair or unreasonable as to render a subsequent confession involuntary. See, e. g., *Brown v. Mississippi*, 297 U. S. 278 (1936); *Chambers v. Florida*, 309 U. S. 227 (1940); *White v. Texas*, 310 U. S. 530 (1940); *Payne v. Arkansas*, 356

<sup>14</sup> The Court has also held that comment on a defendant's silence or refusal to take the witness stand may be an impermissible penalty on exercise of the privilege. See *Griffin v. California*, 380 U. S. 609 (1965).

U. S. 560 (1958); *Haynes v. Washington*, 373 U. S. 503 (1963). See also Wigmore, Evidence, § 815 *et seq.* Where the State's actions offended the standards of fundamental fairness under the Due Process Clause, the State was then deprived of the right to use the resulting confessions in court.

Although federal cases concerning voluntary confessions often contained references to the privilege against compulsory self-incrimination,<sup>15</sup> references which were strongly criticized by some commentators, see VIII Wigmore, Evidence (McNaughton rev. 1961), § 2266,<sup>16</sup> it was

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<sup>15</sup> For example in *Bram v. United States*, 168 U. S. 532, 542 (1897), the Court stated:

"In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person 'shall be compelled in any criminal case to be a witness against himself.'"

As noted in the text the privilege against compulsory self-incrimination was not held applicable against the States until *Malloy v. Hogan*, 378 U. S. 1 (1964).

<sup>16</sup> Wigmore states his objection in the following terms:

"Today in the United States confessions, and probably even lesser self-incriminating admissions, are excluded despite their trustworthiness if coerced. The policies leading to this recent extension of the confession rule are quite similar to those underlying the privilege against self-incrimination. It is thus not surprising that the privilege, with its unclear boundaries and apparently unending capacity for transmogrification and assimilation, is now sometimes invoked to effect exclusion even though the disclosure was not compelled from a person under legal compulsion. Distortion of the privilege to cover such situations is not necessary. If trustworthy confessions are to be excluded because coerced, it should be done frankly as an exception to the principle of § 2183 *supra* that the illegality of source of evidence is immaterial. It should be done, as it usually is, on the ground that the combination of coercion and use of the evidence in the particular case violates the relevant constitutional due process clause." (Citations omitted.)

not until this Court's decision in *Miranda* that the privilege against compulsory self-incrimination was seen as the principal protection for a person facing police interrogation. This privilege had been made applicable to the States in *Malloy v. Hogan*, 378 U. S. 1 (1964), and was thought to offer a more comprehensive and less subjective protection than the doctrine of previous cases. In *Miranda* the Court examined the facts of four separate cases and stated:

"In these cases, we might not find the defendants' statements to have been involuntary in traditional terms. Our concern for adequate safeguards to protect precious Fifth Amendment rights is, of course, not lessened in the slightest. . . . To be sure, the records do not evince overt physical coercion or patent psychological ploys. The fact remains that in none of these cases did the officers undertake to afford appropriate safeguards at the outset of the interrogation to insure that the statements were truly the product of free choice." 384 U. S., at 457.

Thus the Court in *Miranda*, for the first time, expressly declared that the Self-Incrimination Clause was applicable to state interrogations at a police station, and that a defendant's statements might be excluded at trial despite their voluntary character under traditional principles.

To supplement this new doctrine, and to help police officers conduct interrogations without facing a continued risk that valuable evidence would be lost, the Court in *Miranda* established a set of specific protective guidelines, now commonly known as the *Miranda* rules. The Court declared that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective

to secure the privilege against self-incrimination." 384 U. S., at 444. A series of recommended "procedural safeguards" then followed. The Court in particular stated:

"Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." 384 U. S., at 444.

The Court said that the defendant, of course, could waive these rights, but that any waiver must have been made "voluntarily, knowingly and intelligently." 384 U. S., at 444.

The Court recognized that these procedural safeguards were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected. As the Court remarked:

"[W]e cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted." 384 U. S., at 467.

The suggested safeguards were not intended to "create a constitutional straightjacket," 384 U. S., at 467, but rather to provide practical reinforcement for the right against compulsory self-incrimination.

A comparison of the facts in this case with the historical circumstances underlying the privilege against compulsory self-incrimination strongly indicates that the police conduct here did not deprive respondent of his privilege against compulsory self-incrimination as such, but rather failed to make available to him the full measure of procedural safeguards associated with that right since *Miranda*. Certainly no one could contend that the interrogation faced by respondent bore any resemblance to

the historical practices at which the right against compulsory self-incrimination was aimed. The District Court in this case noted that the police had "warned [respondent] that he had the right to remain silent," 352 F. Supp., at 267, and the record in this case clearly shows that respondent was informed that any evidence taken could be used against him.<sup>17</sup> The record is also clear that respondent was asked whether he wanted an attorney and that he replied that he did not.<sup>18</sup> Thus, his statements could hardly be termed involuntary as that term has been defined in the decisions of this Court. Additionally, there were no legal sanctions, such as the threat of contempt, which could have been applied to respondent had he chosen to remain silent. He was simply not exposed to "the cruel trilemma of self-accusation, perjury, or contempt." *Murphy v. Waterfront Commission*, 378 U. S. 52, 55 (1964).

Our determination that the interrogation in this case involved no compulsion sufficient to breach the right against compulsory self-incrimination does not mean there was not a disregard, albeit an inadvertent disregard, of the procedural rules later established in *Miranda*. The question for decision is how sweeping the judicially imposed consequences of this disregard shall be. This Court said in *Miranda* that statements taken in violation of the *Miranda* principles must not be used to prove the prosecution's case at trial. That requirement was fully complied with by the state court here: respondent's statements, claiming that he was with Henderson and then asleep during the time period of the crime were not admitted against him at trial. This Court has also said, in *Wong Sun v. United States*, 371 U. S. 471 (1963), that the "fruits" of police conduct which actually infringed

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<sup>17</sup> See n. 5, *supra*.

<sup>18</sup> See nn. 3 and 4, *supra*.

a defendant's Fourth Amendment rights must be suppressed.<sup>19</sup> But we have already concluded that the police conduct at issue here did not abridge respondent's constitutional privilege against compulsory self-incrimination, but departed only from the prophylactic standards later laid down by this Court in *Miranda* to safeguard that privilege. Thus, in deciding whether Henderson's testimony must be excluded, there is no controlling precedent of this Court to guide us. We must therefore examine the matter as a question of principle.

#### IV

Just as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require that policemen investigating serious crimes make no errors whatsoever. The pressures of law enforcement and the vagaries of human nature would make such an expectation unrealistic. Before we penalize police error, therefore, we must consider whether the sanction serves a valid and useful purpose.

We have recently said, in a search and seizure context, that the exclusionary rule's "prime purpose is to deter future unlawful police conduct and thereby to effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures." *United States v. Calandra*, slip op., p. 9. We then continued:

"The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effective available way—by removing the incentive to disregard

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<sup>19</sup> In *Wong Sun* the police discovered evidence through statements made by the accused after he had been placed under arrest. This Court, finding that the arrest had occurred without probable cause, held that the derivative evidence could not be introduced against the accused at trial. For the reasons stated in the text we do not believe that *Wong Sun* controls the case before us.

it.' *Elkins v. United States*, 364 U. S. 206, 217 (1960)." <sup>20</sup> *United States v. Calandra*, slip op., p. 9.

In a proper case this rationale would seem applicable to the Fifth Amendment context as well.

The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least, negligent conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care towards the right of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.

We consider it significant to our decision in this case that the officers' failure to advise respondent of his right to appointed counsel occurred prior to the decision in *Miranda*.<sup>21</sup> Although we have been urged to resolve the broad question of whether evidence derived from statements taken in violation of the *Miranda* rules must be excluded regardless of when the interrogation took place, we instead place our holding on a narrower ground. For at the time respondent was questioned these police officers were guided, quite rightly, by the principles established in *Escobedo*, *supra*, particularly focusing on the subject's opportunity to have retained counsel with him during the interrogation if he chose to do so.<sup>22</sup>

<sup>20</sup> The opinion also relied upon *Mapp v. Ohio*, 367 U. S. 643, 656 (1961); *Tehan v. United States, ex rel. Shot*, 382 U. S. 406, 416 (1966); and *Terry v. Ohio*, 392 U. S. 1, 29 (1968). See slip op., p. 9.

<sup>21</sup> Brief for United States as *Amicus Curiae*, p. 31 *et seq.*; Brief for Respondent, p. 9 *et seq.*

<sup>22</sup> As previously noted, the defendant in *Escobedo* had repeatedly asked to see his lawyer who was available at the police station.



Thus, the police asked respondent if he wanted counsel, and he answered that he did not. The statements actually made by respondent to the police, as we have observed, were excluded at trial in accordance with *Johnson v. New Jersey*, *supra*. Whatever deterrent effect on future police conduct the exclusion of those statements may have had, we do not believe it would be significantly augmented by excluding the testimony of the witness Henderson as well.

When involuntary statements or the right against compulsory self-incrimination are involved, a second justification for the exclusionary rule also has been asserted: protection of the courts from reliance on untrustworthy evidence.<sup>23</sup> Cases which involve the Self-Incrimination Clause must, by definition, involve an element of coercion, since the clause provides only that a person shall not be *compelled* to give evidence against himself. And cases involving statements often depict severe pressures which may override a particular suspect's insistence on

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Those requests were denied, and the defendant ultimately confessed. Thus, in direct contrast to the situation here, the defendant in *Escobedo* was told he did *not* have a right to see his lawyer, although he had expressly stated his desire to do so.

<sup>23</sup> The Court has made clear that the truth or falsity of a statement is not the determining factor in the decision whether or not to exclude it. *Jackson v. Denno*, 378 U. S. 368 (1964). Thus a State which has obtained a coerced or involuntary statement cannot argue for its admissibility on the ground that other evidence demonstrates its truthfulness. *Ibid*. But it also seems clear that coerced statements have been regarded with some mistrust. The Court in *Escobedo*, for example, stated that "a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuse" than a system relying on independent investigation, 378 U. S., at 489. The Court then cited to several authorities concerned with false confessions. 378 U. S., at 489, n. 11. Although completely voluntary confessions may, in many cases, advance the cause of justice and rehabilitation, coerced confessions, by their nature, cannot serve the same ends.



innocence. Fact situations ranging from classical third-degree torture, *Brown v. Mississippi*, *supra*, to prolonged isolation from family or friends in a hostile setting, *Gallegos v. Colorado*, 370 U. S. 49 (1962), or to a simple desire on the part of a physically or mentally exhausted suspect to have a seemingly endless interrogation end, *Watts v. Indiana*, 338 U. S. 49 (1949), all might be sufficient to cause a defendant to accuse himself falsely.

But those situations are a far cry from that presented here. The pressures on respondent to accuse himself were hardly comparable even with the least prejudicial of those pressures which have been dealt with in our cases. More important, the respondent did *not* accuse himself. The evidence which the prosecution successfully sought to introduce was not a confession of guilt by respondent, or indeed even an exculpatory statement by respondent, but rather the testimony of a third party who was subjected to no custodial pressures. There is plainly no reason to believe that Henderson's testimony is untrustworthy simply because *respondent* was not advised of *his* right to appointed counsel. Henderson was both available at trial and subject to cross-examination by respondent's counsel, and counsel fully used this opportunity, suggesting in the course of his cross-examination that Henderson's character was less than exemplary and that he had been offered incentives by the police to testify against respondent.<sup>24</sup> Thus the reliability of his testimony was subject to the normal testing process of an adversary trial.

Respondent contends that an additional reason for excluding Henderson's testimony is the notion that the adversarial system requires "the government in its contest with the individual to shoulder the entire load." VIII Wigmore, Evidence (McNaughton rev. 1961), § 2251;

<sup>24</sup> Transcript of Trial, p. 226-234.

*Murphy v. Waterfront Commission*, 378 U. S. 52, 55 (1964); *Miranda v. Arizona*, *supra*, at 460. To the extent that this suggested basis for the exclusionary rule in Fifth Amendment cases may exist independently of the deterrence and trustworthiness rationales, we think it of no avail to respondent here. Subject to applicable constitutional limitations, the Government is not forbidden all resort to the defendant to make out its case. It may require the defendant to give physical evidence against himself, see *Schmerber v. California*, 384 U. S. 757 (1966); *United States v. Dionisio*, 410 U. S. 1 (1973), and it may use statements which are voluntarily given by the defendant after he receives full disclosure of the rights offered by *Miranda*. Here we deal not with the offer of defendant's own statements in evidence, but only with the testimony of a witness whom the police discovered as a result of defendant's statements. This recourse to respondent's voluntary statements does no violence to such elements of the adversarial system as may be embodied in the Fifth, Sixth, and Fourteenth Amendments.

In summary, we do not think that any single reason supporting exclusion of this witness' testimony, nor all of them together, are very persuasive.<sup>25</sup> By contrast, we find the arguments in favor of admitting the testimony quite strong. For, when balancing the interests involved, we must weigh the strong interest under any system of justice of making available to the trier of fact all con-

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<sup>25</sup> It has been suggested that courts should exclude evidence derived from "lawless invasions of the constitutional rights of citizens," *Terry v. Ohio*, 392 U. S. 1, 13 (1968), in recognition of "the imperative of judicial integrity." *Elkins v. United States*, 364 U. S. 206, 222 (1960). This rationale, however, is really an assimilation of the more specific rationales discussed in the text of this opinion, and does not in their absence provide an independent basis for excluding challenged evidence.

cededly relevant and trustworthy evidence which either party seeks to adduce. In this particular case we also "must consider society's interest in the effective prosecution of criminals in light of the protection our pre-*Miranda* standards afford criminal defendants." *Jenkins v. Delaware*, 395 U. S. 213, 221 (1969). These interests may be outweighed by the need to provide an effective sanction to a constitutional right, *Weeks v. United States*, 232 U. S. 383 (1914), but they must in any event be valued. Here respondent's own statement, which might have helped the prosecution show respondent's guilty conscience at trial, had already been excised from the prosecution's case pursuant to this Court's *Johnson* decision. To extend the excision further under the circumstances of this case and exclude relevant testimony of a third-party witness would require far more persuasive arguments than those advanced by respondent.

This Court has already recognized that a failure to give interrogated suspects full *Miranda* warnings does not entitle the suspect to insist that statements made by him be excluded in every conceivable context. In *Harris v. New York*, 401 U. S. 222 (1971), the Court was faced with the question of whether the statements of the defendant himself, taken without informing him of his right of access to appointed counsel, could be used to impeach defendant's direct testimony at trial. The Court concluded that they could, saying:

"Some comments in the *Miranda* opinion can indeed be read as indicating a bar to use of an uncounseled statement for any purpose, but discussion of that issue was not at all necessary to the Court's holding and cannot be regarded as controlling. *Miranda* barred the prosecution from making its case with statements of an accused made while in custody prior to having or effectively waiving counsel. It

does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards." 401 U. S., at 224.

We believe that this reasoning is equally applicable here. Although *Johnson* enabled respondent to block admission of his own statements, we do not believe that it requires the prosecution to refrain from all use of those statements, and we disagree with the courts below that Henderson's testimony should have been excluded in this case.<sup>26</sup>

*Reversed.*

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<sup>26</sup> Our Brother BRENNAN in his separate opinion treats the principal question here simply as a lineal descendant of the one decided in *Linkletter v. Walker*, 381 U. S. 618, to be analyzed only in terms of the retroactivity framework established in that and subsequent decisions. While his approach has a beguiling simplicity, we believe it marks a significant and unsettling departure from the past practice of the Court in this area. Our retroactivity cases, from *Linkletter v. Walker*, *supra*, to *Gosa v. Mayden*, 413 U. S. 665 (1973), all have in common a particular factual predicate: a previous constitutional decision of this Court governs the facts of an earlier decided case unless the constitutional decision is not to have retroactive effect. The doctrine of retroactivity does not modify the substantive scope of the constitutional decision but rather determines the point in time when it is held to apply.

That common factual predicate is absent here. No defendant in *Miranda* sought to block evidence of the type challenged in this case, and the holding of *Miranda*, even if made fully retroactive, would not therefore resolve the question of whether Henderson's testimony must also be excluded at trial. Contrary, therefore, to the suggestion in our Brother's opinion that the question here is whether to "limit the effect of *Johnson v. New Jersey*," *post*, p. 1, n. 1, *Johnson* has never been thought controlling on the question of 'fruits, for the simple reason that the parent *Miranda* case did not reach that issue.

Our Brother BRENNAN's method of disposition is to determine in the present case the retroactivity of a holding which the Court has

yet to make. He would say, in effect, that if the Court should later determine that *Miranda* requires exclusion of fruits such as the testimony of Henderson, nonetheless that determination shall not be applied retroactively. But this approach wholly subverts the heretofore established relationship between the parent case and the subsidiary case determining whether or not to apply the parent case retroactively. Under the framework of the analysis established in *Linkletter, supra*, and in subsequent cases, it would seem indispensable to understand the basis for a constitutional holding of the Court in order to later determine whether that holding should be retroactive. Yet *ex hypothesi* our Brother has no such analysis available, since the case has yet to be decided. Cases which *subsequently* determine the retroactivity of a constitutional holding have given the Court enough occasion for concern without substantially increasing the difficulty of that type of decision by making it before, rather than after, the constitutional holding.



# SUPREME COURT OF THE UNITED STATES

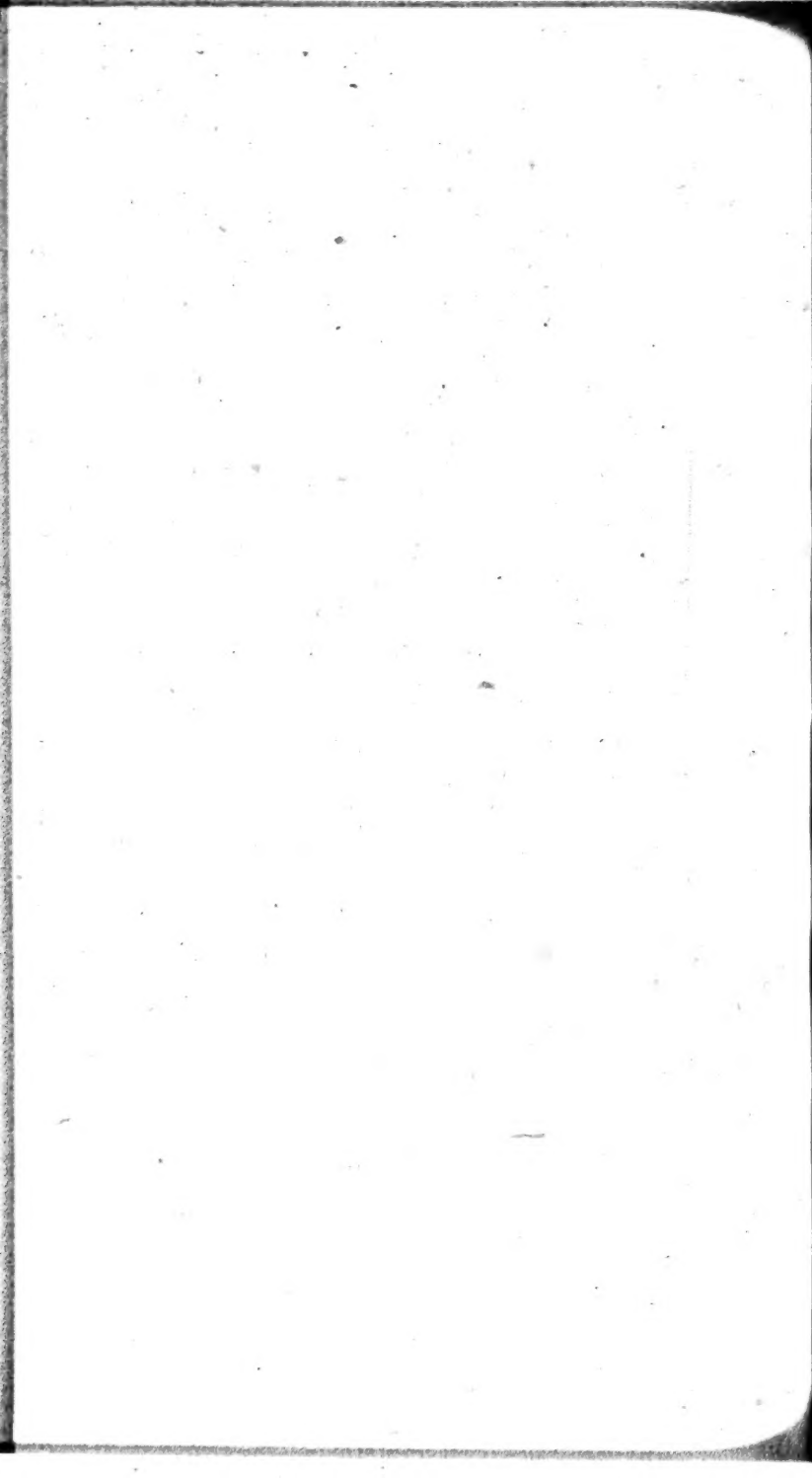
No. 73-482

State of Michigan, Petitioner, v. Thomas W. Tucker.	}	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.
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[June 10, 1974]

MR. JUSTICE STEWART, concurring.

In joining the opinion of the Court, I add only that I could also join MR. JUSTICE BRENNAN's concurrence. For it seems to me that despite differences in phraseology, and despite the disclaimers of their respective authors, the Court opinion and that of MR. JUSTICE BRENNAN proceed along virtually parallel lines, give or take a couple of argumentative footnotes.





# SUPREME COURT OF THE UNITED STATES

No. 73-482

State of Michigan,  
Petitioner,

v.

Thomas W. Tucker.

On Writ of Certiorari to the United  
States Court of Appeals for the  
Sixth Circuit.

[June 10, 1974]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, concurring in the judgment.

The Court finds it unnecessary to decide "the broad question" of whether the fruits of "statements taken in violation of the *Miranda* rules must be excluded regardless of when the interrogation took place," *ante*, at 13, since respondent's interrogation occurred prior to our decision in *Miranda v. Arizona*, 384 U. S. 436 (1966). In my view, however, it is unnecessary, too, for the Court to address the narrower question of whether the principles of *Miranda* require that fruits be excluded when obtained as a result of a pre-*Miranda* interrogation without the requisite prior warnings. The Court, in answering this question, proceeds from the premise that *Johnson v. New Jersey*, 384 U. S. 719 (1966), makes *Miranda* applicable to all cases in which a criminal trial was commenced after the date of our decision in *Miranda*, and that, since respondent's trial was post-*Miranda*, the effect of *Miranda* on this case must be resolved. I would not read *Johnson* as making *Miranda* applicable to this case.<sup>1</sup>

<sup>1</sup> Although the petition for certiorari did not urge us to limit the effect of *Johnson v. New Jersey*, this issue was raised in petitioner's brief as well as in the *amicus curiae* brief of the State of California, filed in support of petitioner. See *Mapp v. Ohio*, 367 U. S. 643, 646 n. 3 (1961); *Stovall v. Denno*, 388 U. S. 293, 294 n. 1 (1967).

Frank acknowledgment that retroactive application of newly announced constitutional rules of criminal procedure may have a serious impact on the administration of criminal justice has led us, since *Linkletter v. Walker*, 381 U. S. 618 (1965), to determine retroactivity in terms of three criteria: (1) the purpose served by the new rules; (2) the extent of law enforcement officials' justifiable reliance on prior standards; and (3) the effect on the administration of justice of a retroactive application of the new rules. See, e. g., *Michigan v. Payne*, 412 U. S. 47, 51 (1973); *Stovall v. Denno*, 388 U. S. 293, 297 (1967); *Tehan v. Shott*, 382 U. S. 406, 410-418 (1966). We have as a general matter limited our discussion of the relevant "purpose" of new rules to their functional value in enhancing the reliability of the factfinding process. See, e. g., *Williams v. United States*, 401 U. S. 646, 653 (1971); *id.*, at 663 (concurring opinion); *Desist v. United States*, 394 U. S. 244, 249-250 (1969); *Roberts v. Russell*, 392 U. S. 293, 294 (1968); *Tehan v. Shott*, *supra*; *Linkletter v. Walker*, *supra*, at 638-639. This limiting approach has been taken in recognition that "[t]he basic purpose of a trial is the determination of truth," *Tehan v. Shott*, *supra*, at 416; see *Stovall v. Denno*, *supra*, at 297-298, and that the principal legitimate interest of a convicted defendant is therefore assurance that the factfinding process at his trial was not unduly impaired by adherence to the old standards.

In *Johnson v. New Jersey*, *supra*, the Court was called upon to determine whether the newly announced procedures in *Miranda v. Arizona* should be retroactively applied to upset final convictions based in part upon confessions obtained without the prior warnings required by *Miranda*. Aware that *Miranda* provided new safeguards against the possible use at trial of unreliable statements of the accused, we nonetheless concluded that the

decision should not be retroactively applied.<sup>2</sup> The probability that the truth-determining process was distorted by, and individuals were convicted on the basis of, coerced confessions was minimized, we found, by the availability

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<sup>2</sup> In *Johnson* we commented—as we have on a number of occasions in deciding to apply new constitutional rules of criminal procedure retroactively—that “we do not disparage a constitutional guarantee in any manner by declining to apply it retroactively.” 384 U. S., at 728; *Michigan v. Payne*, *supra*, 412 U. S., at 55, n. 10. This is so, because a prospective application of new rules will often serve important purposes other than the correction of serious flaws in the truth-determining process.

The Fifth Amendment privilege against compulsory self-incrimination—guaranteed full effectuation by the *Miranda* rules—serves a variety of significant purposes not relevant to the truth-determining process. See *Tehan v. Shott*, *supra*, 382 U. S., at 415–416. A number of these purposes were catalogued in *Murphy v. Waterfront Comm’n*, 378 U. S. 52, 55 (1964):

“The privilege against self-incrimination ‘registers an important advance in the development of our liberty—“one of the great landmarks in man’s struggle to make himself civilized.”’ *Ullmann v. United States*, 350 U. S. 422, 426. It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates ‘a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load,’ 8 Wigmore, *Evidence* (McNaughton rev., 1961), 317; our respect for the inviolability of the human personality and of the right of each individual ‘to a private enclave where he may lead a private life,’ *United States v. Grunewald*, 233 F. 2d 556, 581–582 (Frank, J., dissenting), rev’d 353 U. S. 391; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes ‘a shelter to the guilty,’ is often ‘a protection to the innocent.’ *Quinn v. United States*, 349 U. S. 155, 162.” (Footnotes omitted.)

of strict pre-*Miranda* standards to test the voluntariness of confessions. *Id.*, at 730. In addition, we recognized that law enforcement agencies had justifiably relied on our prior rulings and that retroactive application would necessitate the wholesale release and subsequent retrial of vast numbers of prisoners. *Id.*, at 731. Then, in statements unnecessary to our decision—since all of the convictions of the petitioners in *Johnson* had long since become final at the time of our decision in *Miranda*—we went on to say that our newly announced *Miranda* rules should be applied to trials begun after the date that decision was announced. *Id.*, at 732.

The conclusion that the *Miranda* rules should be applied to post-*Miranda* trials made good sense, where criminal defendants were seeking to exclude *direct statements* made without prior warning of their rights. Exclusion of possibly unreliable pre-*Miranda* statements made in the inherently coercive atmosphere of in-custody interrogation, see *Miranda v. Arizona*, *supra*, at 457-458, 467, 470, could be obtained at a relatively low cost. For, although the police might have relied in good faith on our prior rulings in interrogating defendants without first advising them of their rights, *Miranda* put the police on notice that pre-*Miranda* confessions obtained without prior warnings would be inadmissible at defendants' trials. Since defendants who had made pre-*Miranda* confessions had not yet gone to trial, and the police investigations into those cases were still fresh, *Johnson* envisioned "no undue burden [being] imposed upon prosecuting authorities by requiring them to find evidentiary substitutes for statements obtained in violation of the constitutional protections afforded by *Miranda*." *Jenkins v. Delaware*, 395 U. S. 213, 219-220 (1969); see *Johnson v. New Jersey*, *supra*, 384 U. S., at 732.

Application of the *Miranda* standards to the present case, however, presents entirely different problems. Unlike the situation contemplated in *Johnson*, the burden imposed upon law enforcement officials to obtain evidentiary substitutes for inadmissible "fruits" will likely be substantial. The lower courts, confronted with the question of the application of *Miranda* to fruits, have provided differing answers on the admissibility issue.<sup>3</sup> The police, therefore, could not reasonably have been expected to know that substitute evidence would be necessary. As a result, in a case such as the present one, in which law enforcement officials have relied on trial and appellate court determinations that fruits are admissible, a contrary ruling by this Court, coming years after the commission of the crime, would severely handicap any attempt to retry the defendant. The burden on law enforcement officers, in that circumstance, would be comparable to that in *Jenkins v. Delaware*, *supra*, 395 U. S. 213, where we declined to apply the *Miranda* rules to post-*Miranda* retrials of persons whose original trials were commenced prior to *Miranda*. There, we said:

"[C]oncern for the justifiable reliance of law enforcement officials upon pre-*Miranda* standards militates against applying *Miranda* to retrials . . . . As we stated in *Stovall* [v. *Denno*, *supra*], '[I]nquiry would be handicapped by the unavailability of witnesses and dim memories.' 388 U. S., at 300. The burden would be particularly onerous where an investigation was closed years prior to a retrial because law

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<sup>3</sup> Compare the decisions of the Michigan courts in the instant case, 19 Mich. App. 320, 172 N. W. 2d 712 (1969), and 385 Mich. 594, 189 N. W. 2d 290 (1971), with *United States v. Cassell*, 452 F. 2d 533 (1971), and *People v. Peacock*, 29 App. Div. 2d 762, 287 N. Y. S. 2d 166 (1968).

enforcement officials relied in good faith upon a strongly incriminating statement, admissible at the first trial, to provide the cornerstone of the prosecution's case." 395 U. S., at 220 (footnote omitted).

Moreover, the element of unreliability—a legitimate concern in *Johnson* because of the inherently coercive nature of in-custody interrogation—is of less importance when the admissibility of "fruits" is at issue. There is no reason to believe that the coercive atmosphere of the station-house will have any effect whatsoever on the trustworthiness of "fruits."

Since excluding the fruits of respondent's statements would not further the integrity of the factfinding process and would severely handicap law enforcement officials in obtaining evidentiary substitutes, I would confine the reach of *Johnson v. New Jersey* to those cases in which the direct statements of an accused made during a pre-Miranda interrogation were introduced at his post-Miranda trial. If *Miranda* is applicable at all to the fruits of statements made without proper warnings, I would limit its effect to those cases in which the fruits were obtained as a result of post-Miranda interrogations. Cf. *Stovall v. Denno*, *supra*; *Desist v. United States*, *supra*.<sup>4</sup>

<sup>4</sup> Three approaches have been taken in deciding what cases should be affected by prospective application of new constitutional rules of criminal procedure. In *Linkletter v. Walker*, *supra*, 381 U. S. 618, the Court held the exclusionary rule of *Mapp v. Ohio*, 367 U. S. 643 (1961), applicable to all cases in which direct review had not come to an end at the time *Mapp* was announced. See also *Tehan v. Shott*, *supra*, 382 U. S. 406. That approach, as we have observed, was abandoned in *Johnson v. New Jersey*, where we stated that the *Miranda* rules were applicable to all trials commenced after the date of that decision. In more recent decisions, we have regarded the cutoff point as that at which law enforcement officials could first begin to guide their conduct in accordance with our new rules. Thus, in *Stovall v. Denno*, *supra*, 388 U. S. 293, the confrontation rulings of *United States v. Wade*, 388 U. S. 218 (1967), and *Gilbert v. Cali-*

Since I agree that the judgment of the Court of Appeals must be reversed, I concur in the judgment of the Court.<sup>5</sup>

*for*nia, 388 U. S. 263 (1967), were made applicable to cases in which the confrontations took place after the date of those decisions, and in *Desist v. United States*, *supra*, 394 U. S. 244, the exclusionary ruling of *Katz v. United States*, 389 U. S. 347 (1967), was made applicable only to cases in which the search and seizure took place after the announcement of *Katz*. See also *Michigan v. Payne*, *supra*, 412 U. S. 47, 57 n. 15; *Williams v. United States*, 401 U. S. 646, 656-657 (1971). But cf. *Fuller v. Alaska*, 393 U. S. 80, 81 (1968) (holding that *Lee v. Florida*, 392 U. S. 378 (1968), which ruled evidence seized in violation of Section 605 of the Federal Communications Act, 47 U. S. C. § 605, inadmissible in state trials, applicable to all cases in which the evidence was introduced after the date of decision in *Lee*).

The trend of our decisions since *Johnson* has thus been toward placing increased emphasis upon the point at which law enforcement personnel initially relied upon the discarded constitutional standards, see *Jenkins v. Delaware*, *supra*, 395 U. S., at 218 & n. 7. As has been noted by an eminent judicial authority, such an emphasis is wholly consistent with the underlying rationale for prospective application of new rules, i. e., justified reliance upon prior judicial standards. Schaefer, The Control of "Sunbursts": Techniques of Prospective Overruling, 42 N. Y. U. L. Rev. 631, 645-646 (1967).

<sup>5</sup> My Brother REHNQUIST argues that this concurrence "marks a significant and unsettling departure from the past practice of the Court" in respect of retroactivity. *Ante*, p. 18 n. 26. He argues that *Miranda* did not decide the question of the admissibility of fruits, and therefore that there is no "parent" decision for retroactive application. But the assumption upon which the concurrence rests, namely, that *Miranda* requires the exclusion of fruits, necessarily treats *Miranda* as a "parent" decision. For the assumption is that exclusion is necessary to give full effect to the purposes and policies underlying the *Miranda* rules and to its holding that "unless and until [the *Miranda*] warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against [the defendant]." 384 U. S., at 479 (emphasis added). It necessarily follows that *Miranda* itself is the "parent" decision.





# SUPREME COURT OF THE UNITED STATES

No. 73-482

State of Michigan,  
Petitioner,  
v.  
Thomas W. Tucker.

On Writ of Certiorari to the United  
States Court of Appeals for the  
Sixth Circuit.

[June 10, 1974]

MR. JUSTICE WHITE, concurring in the judgment.

For the reasons stated in my dissent in that case, I continue to think that *Miranda v. Arizona*, 384 U. S. 436 (1966), was ill-conceived and without warrant in the Constitution. However that may be, the *Miranda* opinion did not deal with the admissibility of evidence derived from in-custody admissions obtained without the specified warnings, and the matter has not been settled by subsequent cases.

In *Orozco v. Texas*, 394 U. S. 324 (1969), it appeared that petitioner, who was convicted of murder, had been arrested and interrogated in his home without the benefit of *Miranda* warnings. Among other things, petitioner admitted having a gun and told the police where it was hidden in the house. The gun was recovered and ballistic tests, which were admitted into evidence along with various oral admissions, showed that it was the gun involved in the murder. Petitioner's conviction was affirmed, the applicability of *Miranda* being rejected by the state courts. Petitioner brought the case here, urging in his petition for certiorari, which was granted, that the ballistic evidence was a fruit of an illegal interrogation—"the direct product of interrogation" without indispensable constitutional safeguards. His brief on the merits suggested that it was error under *Miranda* to admit into evidence either his oral admissions or the

evidence of ballistic tests performed on the pistol, which was referred to as "an illegally seized object." This Court reversed the conviction but after referring to the ballistic evidence, went on to hold only that the admission into evidence of Orozo's statements made without benefit of *Miranda* warnings was fatal error. Although the issue was presented, the Court did not expressly deal with the admissibility of the ballistic tests and gave no intimation that the evidence was to be excluded at the anticipated retrial.

*Miranda* having been applied in this Court only to the exclusion of the defendant's own statements, I would not extend its prophylactic scope to bar the testimony of third persons even though they have been identified by means of admissions that are themselves inadmissible under *Miranda*. The arguable benefit from excluding such testimony by way of possibly deterring police conduct that might compel admissions are, in my view, far outweighed by the advantages of having relevant and probative testimony, not obtained by actual coercion, available at criminal trials to aid in the pursuit of truth. The same results would not necessarily obtain with respect to the fruits of involuntary confessions. I therefore concur in the judgment.

# SUPREME COURT OF THE UNITED STATES

No. 73-482

State of Michigan, Petitioner, v. Thomas W. Tucker.	}	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.
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[June 10, 1974]

MR. JUSTICE DOUGLAS, dissenting.

In this case the respondent, incarcerated as a result of a conviction in a state court, was granted a writ of habeas corpus by the District Court. The basis for the writ was the introduction at respondent's trial of testimony from a witness whose identity was learned solely as a result of in-custody police interrogation of the respondent preceded by warnings which were deficient under the standards enunciated in *Miranda v. Arizona*, 384 U. S. 436 (1966). The District Court concluded that "the introduction by the prosecution in its case in chief of testimony of a third person which is admittedly the fruit of an illegally obtained statement by the [accused violates the accused's] Fifth Amendment rights." 352 F. Supp. 266, 268 (ED Mich. 1972). The Court of Appeals affirmed. 480 F. 2d 927 (CA6 1973).

## I

Prior to interrogation, the respondent was told of his right to the presence of counsel but he was not told of his right to have an attorney appointed should he be unable to afford one. Respondent is an indigent who has been represented at all times in both state and federal

courts by court-appointed counsel. In *Miranda, supra*, we said:

"The need for counsel in order to protect the privilege [against self-incrimination] exists for the indigent as well as the affluent . . . . While authorities are not required to relieve the accused of his poverty, they have the obligation not to take advantage of indigence in the administration of justice . . . . In order to fully apprise a person interrogated of the extent of his rights under this system then, it is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him." 384 U. S., at 472-473.

I cannot agree when the Court says that the interrogation here "did not abridge respondent's constitutional privilege against self-incrimination, but departed only from the prophylactic standards later laid down by this Court in *Miranda* to safeguard that privilege." *Ante*, p. —. The Court is not free to prescribe preferred modes of interrogation absent a constitutional basis. We held the "requirement of warnings and waiver of rights [to be] fundamental with respect to the Fifth Amendment privilege," 384 U. S., at 476, and without so holding we would have been powerless to reverse *Miranda's* conviction. While *Miranda* recognized that police need not mouth the precise words contained in the Court's opinion, such warnings were held necessary "unless other fully effective means are adopted to notify the person" of his rights. *Id.*, at 479. There is no contention here that other means were adopted. The respondent's statements were thus obtained "under circumstances that did not meet constitutional standards for the protection of the privilege [against self-incrimination]." *Id.*, at 491.

## II

With the premise that respondent was subjected to an unconstitutional interrogation, there remains the question whether not only the testimony elicited in the interrogation but also the fruits thereof must be suppressed. Mr. Justice Holmes first articulated the "fruits" doctrine in *Silverthorne Lumber Co. v. United States*, 251 U. S. 385 (1920). In that case the Government had illegally seized the petitioner's corporate books and documents. The Government photographed the items before returning them and used the photographs as a basis to subpoena the petitioner to produce the originals before the grand jury. The petitioner refused to comply and was cited for contempt. In reversing, the Court noted that "the essence of a provision forbidding the acquisition of evidence in a certain way is not merely that the evidence so acquired shall not be used before the court but that it shall not be used at all." *Id.*, at 392.

The principle received more recent recognition in *Wong Sun v. United States*, 371 U. S. 471 (1963). There one Toy had made statements to federal agents and the statements were held inadmissible against him. The statements led the agents to one Yee and at Yee's home the agents found narcotics which were introduced at trial against Toy. In reversing Toy's conviction the Court held that the narcotics discovered at Yee's home must be excluded just as Toy's statements which led to that discovery.

The testimony of the witness in this case was no less a fruit of unconstitutional police action than the photographs in *Silverthorne* or the narcotics in *Wong Sun*. The petitioner has stipulated that the identity and the whereabouts of the witness and his connection with the case were learned about only through the unconstitutional interrogation of the respondent. His testimony

must be excluded to comply with *Miranda's* mandate that "no evidence obtained as a result of interrogation [not preceded by adequate warnings] can be used against" an accused. 384 U. S., at 479.

### III

In *Johnson v. New Jersey*, 384 U. S. 719 (1966), the Court held that statements obtained in violation of *Miranda* standards must be excluded from all trials occurring after the date of the *Miranda* decision. MR. JUSTICE BRENNAN suggests that *Johnson* be limited and that the fruits derived from unlawful pre-*Miranda* interrogations be admissible in trials subsequent to the *Miranda* decision. Though respondent's trial occurred subsequent to the *Miranda* decision, his interrogation preceded it. I disagree, as I disagreed in *Johnson*, that any defendant can be deprived of the full protection of the Fifth Amendment, as the Court has construed it in *Miranda*, based upon an arbitrary reference to the date of his interrogation or his trial.

In *Linkletter v. Walker*, 381 U. S. 618 (1965), the Court held the exclusionary rule of *Mapp v. Ohio*, 367 U. S. 643 (1961), inapplicable to convictions which had become "final" prior to the *Mapp* decision. As Mr. Justice Black and I noted, the result was that:

"Linkletter, convicted in the state court by use of 'unconstitutional evidence,' is today denied relief by the judgment of this Court because his conviction became "final" before *Mapp* was decided. Linkletter must stay in jail; Miss Mapp, whose offense was committed before Linkletter's, is free. This different treatment of Miss Mapp and Linkletter points up at once the arbitrary and discriminatory nature of the judicial contrivance utilized here to break the promise of *Mapp* by keeping all people

in jail who are unfortunate enough to have had their unconstitutional convictions affirmed before June 19, 1961." 381 U. S., at 641 (Black, J., dissenting).

I find any such reference to the calendar in determining the beneficiaries of constitutional pronouncements to be a grossly invidious discrimination. Miranda was interrogated on March 13, 1963; Tucker was interrogated more than three years later in April 1966. I can conceive of no principled way to deprive Tucker of the constitutional guarantees afforded Miranda. The reason put forward for refusing to apply the strictures of *Miranda* to interrogations which preceded the decision is that the purpose of *Miranda's* rules is the deterrence of unconstitutional interrogation. "The inference I gather from these repeated statements is that the rule is not a right or privilege accorded to defendants charged with crime but is a sort of punishment against officers in order to keep them from depriving people of their constitutional rights. In passing I would say that if that is the sole purpose, reason, object and effect of the rule, the Court's action in adopting it sounds more like law-making than construing the Constitution." 381 U. S., at 649 (Black, J., dissenting). *Miranda's* purpose was not promulgation of judicially preferred standards for police interrogation, a function we are quite powerless to perform; the decision enunciated "constitutional standards for the protection of the privilege" against self-incrimination. 384 U. S., at 191. People who are in jail because of a State's use of unconstitutionally derived evidence are entitled to a new trial, with the safeguards the Constitution provides, without regard to when the constitutional violation occurred, when the trial occurred or when the conviction became "final."

As Mr. Justice Black said in *Linkletter*: "It certainly offends my sense of justice to say that a State holding

in jail people who were convicted by unconstitutional methods has a vested interest in keeping them there that outweighs the right of persons adjudged guilty of crime to challenge their unconstitutional convictions at any time." 381 U. S., at 618.

I would affirm the judgment below.



